86-686

No. _____

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA ST.
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

QUESTIONS PRESENTED

1. Whether the Commerce Clause of the United States Constitution requires the California Public Utilities Commission to authorize sales of electrical power to a California public utility by small power producers and cogenerators situated in the States of Oregon and Washington on the same terms and conditions as are afforded to small power producers and cogenerators situated in the State of California.

2. Whether the Contract Clause of the United States Constitution has been violated by an order of the California Public Utilities Commission directly abrogating several contracts for the sale of electrical power to a public utility by small power producers and cogenerators, where these contracts had been entered into in strict accordance with previously adopted rules of the Commission and where the Commission had previously declared that such contracts "will not be subject to retroactive change."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	
TABLE OF CONTENTS	
TABLE OF AUTHORITIES	
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	3
INTRODUCTORY STATEMENT	3
STATEMENT OF THE CASE	9
1. Statutory and Regulatory Background	9
2. The Intitial Regulations of the Commission	14
3. PG&E's Transmission Constraints and the "Interim Solution"	20
4. Suspension of Standard Offer No. 4 and the "Orphan Contracts" Decision	26
5. Abrogation of Hydropool's Contracts	31
6. The Proceedings Below	38
THE QUESTIONS ARE SUBSTANTIAL	40
1. The Commerce Clause	40
2. The Contract Clause	54
CONCLUSION	65

TABLE OF AUTHORITIES

Cases	Page
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)	56,58,60,61,64,65
American Paper Inst. v. American Elec. Power Corp., 461 U.S. 402 (1983)	4,10,11
Appleby v. Delaney, 271 U.S. 403 (1926)	62
Atchison, Topeka & S.F.R.R. v. Public Utilities Comm., 346 U.S. 346 (1953)	2
Atlantic Coast Line R.Co. v. Goldsboro, 232 U.S. 548 (1914)	62
Baldwin v. Seelig 294 U.S. 511 (1935)	53
Best & Co. v. Maxwell, 311 U.S. 454 (1940)	41
Consumers Lobby v. Public Utilities Comm., 25 Cal.3d 891, 603 P.2d 41 (1979)	2
Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)	52
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983).	57,58,60,61,63
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	57,60,61
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)	64
FERC v. Mississippi, 456 U.S. 742 (1982)	10,53

Grand Trunk Western R.Co. v. Railroad Comm., 221 U.S. 400 (1911) 62

Hamilton v. Regents, 293 U.S. 245 (1934) 1

Hughes v. Oklahoma, 441 U.S. 332 (1979) 42,48,49,51,52

Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333 (1977) 48,51

Lathrop v. Donohue, 367 U.S. 820 (1961) 1

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 47,48,52

Maine v. Taylor, __ U.S. __, 106 S.Ct. 2440 (1986) 40-41,43,49

Metropolitan Life Ins. Co. v. Ward, __ U.S. __, 105 S.Ct. 1676 (1985) 47

Minnesota Assn. of Health Care Facils. v. Minnesota Dept. of Welfare, 742 F.2d 442 (8th Cir. 1984) 58,60

Napa Valley Elec. Co. v. Railroad Comm., 251 U.S. 366 (1920) 2

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 52

Pacific Tel. & Tel. Co. v. Public Utilities Comm., 600 F.2d 1309 (9th Cir. 1979) 2

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 48,52

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 48

Sultan R. & T. Co. v. Dept. of Labor, 277 U.S. 135 (1928) 1

Troy, Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984) 58

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 56,57,60,61,63,64,65

Wood v. Lovett, 313 U.S. 362 (1941) 62

Constitutions, Statutes, Regulations

U.S. Const., art. 1, §8 3,6,40-42,47-50

U.S. Const., art. 1, §10 3,6,7,9,55-62

16 U.S.C. §824a-3 3,9,10,53-54

28 U.S.C. §1257 1,2

28 U.S.C. §2101 2

18 C.F.R. §292 3,4,11,12,13,17

Cal. Pub. Util. Code §1733 39

Cal. Pub. Util. Code §1757 2

Cal. Pub. Util. Code §1759 39

Cal. Pub. Util. Code §1760 2

Articles

Epstein, Toward a Revitalization of the Contract Clause, 51 U.Chi. L.Rev. 703 (1985) 58,61

Hale, The Supreme Court and the Contract Clause, 57 Harv.L.Rev. 852 (1944) 56

Note, Rediscovering the Contract Clause, 97 Harv. L.Rev. 1414 (1984) 58,59,61

OPINIONS BELOW

The judgment appealed from was rendered without opinion and is not reported. A copy is attached hereto as Appendix A. The order of the California Public Utilities Commission which is affirmed by the judgment below is also unpublished. A copy of the order and supporting opinion is attached as Appendix B. Excerpts from other relevant orders of the Commission are reprinted in Appendices C through M.

JURISDICTION

The administrative order whose constitutionality is drawn in question in this case purports to enunciate a general rule governing the sale of electrical power to California public utilities by out-of-state power producers (App. B, pp. 16-18). The order is therefore a "statute of [a] state" within the meaning of 28 U.S.C. §1257 as that term has previously been interpreted by this Court. Lathrop v. Donohue, 367 U.S. 820, 824-25 (1961); Hamilton v. Regents, 293 U.S. 245, 257-58 (1934); Sultan R. & T. Co. v. Dept. of

Labor, 277 U.S. 135, 136 (1928). The judgment of the California Supreme Court denying appellants' petition for review of the Commission's order is a decision on the merits sustaining the validity of the order. Cal. Pub. Util. Code §§1757, 1760; Atchison, Topeka & S.F.R.R. v. Public Utilities Comm., 346 U.S. 346, 348-49 (1953); Napa Valley Elec. Co. v. Railroad Comm., 251 U.S. 366, 372-73 (1920); Pacific Tel. & Tel. Co. v. Public Utilities Comm., 600 F.2d 1309, 1311-14 (9th Cir. 1979); Consumers Lobby v. Public Utilities Comm., 25 Cal.3d 891, 603 P.2d 41, 46 (1979). Jurisdiction of this appeal from that judgment is therefore conferred on this Court by the provisions of 28 U.S.C. §1257(2). Atchison, Topeka & S.F.R.R. v. Public Utilities Comm., supra. The judgment below having been entered on July 30, 1986, and the Notice of Appeal from the judgment having been filed on October 15, 1986, this appeal has been timely perfected pursuant to the provisions of 28 U.S.C. §2101(c). A copy of the Notice of Appeal is attached as Appendix R.

STATUTES INVOLVED

In addition to the several regulations and directives of the California Public Utilities Commission reprinted in Appendices B through M, the constitutional provisions, statutes, and regulations involved in this case are the Commerce Clause and the Contract Clause of the United States Constitution, and the federal statutes and regulations governing the sale of electrical power by small power producers and cogenerators that are codified in 16 U.S.C. §824a-3 and 18 C.F.R. §§292.302-304. Pertinent excerpts from these provisions are set forth in Appendix Y.

INTRODUCTORY STATEMENT

Appellant Hydropool is a partnership of which appellant Cogeneration Services, Inc., is one of the partners. Hydropool is a part owner of two small electrical generation projects in the State of Oregon, and either owns the rights to, or possesses an exclusive marketing agency for, the power produced by several other small producers and cogenerators located in Oregon and Washington. All of these projects have

satisfied the criteria for becoming "qualifying facilities" within the meaning of the federal statutes and regulations requiring state public utility commissions to develop rules for the mandatory purchase of electric power from cogenerators and small power producers by public utilities within their jurisdictions. 16 U.S.C. §824a-3; 18 C.F.R. §§292.203-7. See American Paper Inst. v. American Elec. Power Corp., 461 U.S. 402, 403-5 (1983).

Hydropool is seeking to sell the power produced by its projects to appellee Pacific Gas and Electric Company ("PG&E"), a California public utility, in accordance with the rules that have been prescribed for such sales by appellee California Public Utilities Commission ("the Commission") pursuant to its federal mandate. For each of these projects, Hydropool has formally accepted one of the "standard offers" for the purchase of power that have been extended to qualifying facilities by PG&E in compliance with the Commission's regulations and has thus satisfied all of the conditions mandated by those regulations for the formation

of a binding purchase contract with PG&E.

PG&E has nevertheless refused to purchase power from Hydropool pursuant to these contracts, and this refusal has been sustained by the Commission in the decision that is challenged in this proceeding. The stated reason for the Commission's decision is that purchases of power from Hydropool and other out-of-state qualifying facilities would be disadvantageous to California's ratepayers because such power would be delivered over an interstate transmission line having a limited transmission capacity, and would thus displace, under certain conditions, imports of hydroelectric power from various Northwest utilities that would otherwise be available at prices somewhat lower than those prescribed in the "standard offer" for purchases of power from qualifying facilities. On the basis of this rationale, the Commission, in its decision, has retroactively abrogated Hydropool's purchase contracts with PG&E, denied Hydropool the right to sell its power to PG&E at "standard offer" prices, and directed

the commencement of a separate investigation of "the general question of the terms and conditions, if any, under which out-of-state QFs [qualifying facilities] should be allowed interconnection" to PG&E's transmission facilities (App. B, pp. 17a-18).

Hydropool contends that this decision violates both the Commerce Clause and the Contract Clause of the federal Constitution. In support of its challenge under the Commerce Clause, Hydropool points to the undisputed fact that other qualifying facilities, which are located in California, are presently selling to PG&E, with the sanction of the Commission and at "standard offer" prices, power which must be delivered over the same constrained interstate transmission line that would be used for the delivery of Hydropool's power, and which therefore causes a displacement of economical imports from the Northwest of precisely the same sort that would be caused by Hydropool's deliveries. In light of this fact, Hydropool submits that the Commission's decision upholding PG&E's refusal to accept its

deliveries amounts to blatant discrimination against interstate commerce that cannot be sustained on the rationale espoused by the Commission or on any other legitimate rationale.

Hydropool's further challenge to the Commission's decision under the Contract Clause is based on the earlier rulings of the Commission establishing the conditions for the formation of binding purchase contracts between qualifying facilities and California public utilities. In those decisions, the Commission repeatedly declared that a qualifying facility's acceptance of a "standard offer" promulgated by a utility pursuant to the Commission's directives would result in "a complete contract" which "will not be subject to having terms or prices changed later" or to "retroactive change based on prospective developments" (App. C, p. 23; App. D, p. 3; App. E, pp. 3, 39; App. K, pp. 27-29). In this regard, the Commission specifically renounced its own authority to modify such contracts by declaring that "we recognize that

we cannot order retroactive changes to [standard offer] contracts," but that "we are willing to commit to that loss in flexibility" in the interest of encouraging investment in cogeneration and small power production (App. E, p. 40; see App. K, p. 29). Despite these commitments, and despite Hydropool's intervening investment of substantial sums in power production facilities in reliance on these commitments, the Commission, by the decision challenged herein, has not only modified, but has entirely abrogated, all of the "standard offer" contracts which Hydropool has entered into with PG&E pursuant to the previous regulations of the Commission. Hydropool submits that, if the constitutional guarantee against state action "impairing the Obligation of Contracts" retains any force at all, it must be deemed to nullify this breach of faith on the part of the Commission.

The issues raised by both of these contentions are sufficiently substantial to warrant plenary consideration by this Court. Judicial censure of the Commission's parochial

and discriminatory treatment of out-of-state power producers is necessary to prevent frustration of the expressed congressional objective of promoting small power production on a national scale as a means of contributing to the goal of national self-sufficiency in the production of electrical energy. Judicial reproof of the Commission's abrogation of Hydropool's constitutionally protected contractual rights would likewise advance a significant goal, inasmuch as the Commission's action in this regard is sufficiently flagrant to afford the Court an exemplary opportunity to reaffirm its commitment to the important values subserved by the Contract Clause.

STATEMENT OF THE CASE

1. Statutory and Regulatory Background. The statutory foundation of the transactions and proceedings at issue in this case is the provision of the Public Utilities Regulatory Policies Act of 1978 ("PURPA") that mandates the purchase of power by public utilities from cogenerators and small power producers. 16 U.S.C. §824a-3. This provision of the Act has

been described in two prior opinions of this Court and need not be exhaustively recounted here. American Paper Inst. v. American Elec. Power Corp., supra; FERC v. Mississippi, 456 U.S. 742, 750-51 (1982). In brief, the operative sections require the Federal Energy Regulatory Commission ("FERC") to issue rules establishing, within certain general guidelines prescribed by the Act, the terms and conditions for such purchases of power, and further require the regulatory commissions of the various states to undertake the implementation and enforcement of these rules. 16 U.S.C. §§824a-3(a), 824a-3(f)(1).

The legislative history reveals that the overall purpose of the Act, including the provision relating to small power production, was to resolve an "energy problem [that] was nationwide in scope" and to "lessen the ... dependence on foreign oil" that was viewed as "seriously jeopardiz[ing] the Nation's economy and ... undermin[ing] the independence of the United States." FERC v. Mississippi, supra at 745-46, 755-57 (quoting pertinent legislative

materials). An equally significant feature of the legislative history, for present purposes, was Congress's express recognition of the imposing risks that had previously discouraged investment in cogeneration and small power production, and the consequent need for special incentives and assurances to reduce such risks and thereby promote such investment. H.R. Conf. Rept. No. 95-1750, pp. 97-98 (1978). See American Paper Inst. v. American Elec. Power Corp., supra at 406, 414; 45 Fed.Reg. 12224 (1980).

Pursuant to its congressional mandate, FERC has adopted detailed regulations governing the terms and conditions for the purchase of power from cogenerators and small power producers, who are collectively referred to in the regulations as "qualifying facilities." 18 C.F.R., part 292. These regulations provide that the price to be paid for such purchases shall be the purchasing utility's "full avoided cost" - that is, the cost which the utility would have incurred by generating the same amount of power itself or purchasing the power

elsewhere. 18 C.F.R. §292.304(b)(2). See American Paper Inst. v. American Elec. Power Corp., supra at 406. Computation of the amount of each utility's full avoided cost is delegated by the regulations to the appropriate regulatory authorities of each state, who are also charged with resolving any disputes arising in the course of the implementation of the regulations and with carrying out various other administrative tasks. 18 C.F.R. §§292.302(d)-(e), 292.303(b).

The FERC regulations confer on each qualifying facility an option to commit itself to a long-term contract for the supply of power to a utility at a price to be dictated by an estimate of the utility's average avoided costs over the life of the contract. Id., §292.304(d)(2). In addition, the regulations prohibit a utility from refusing to accept deliveries from a qualifying facility on the basis of "temporary operational circumstances" except under conditions of "negative avoided cost" - that is, when the acceptance of such deliveries would "result in costs greater than

those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself." Id., §292.304(f). Finally, the regulations require utilities to accept sales of power from qualifying facilities located outside their service territories under arrangements whereby the power is "wheeled" to the purchasing utilities over the transmission lines of the other utilities in whose service territories the qualifying facilities are located. Id., §292.303(d).

The comments accompanying the issuance of the FERC regulations make clear that this last provision - requiring the acceptance of power deliveries from outside the purchasing utility's service area - specifically contemplates that qualifying facilities may take advantage of differences in the avoided-cost rates established for different utilities by the various state regulatory commissions by "wheeling" power over interconnecting transmission lines to utilities having higher rates than the utilities to which the original

connections are made. 45 Fed.Reg. 12219, 12221 (1980). These same comments also reiterate the congressional goal of reducing the financial risks of investment in small power production projects by emphasizng "the need for certainty with regard to return on investment" in such projects as a major factor in the development of any federal or state regulation establishing the terms and conditions for purchases of their power output. Id. at 12224; see also id. at 12218.

2. The Initial Regulations of the Commission. To carry out its responsibility under PURPA and the FERC regulations to develop prices and other terms for the purchase of power from qualifying facilities (or "QFs" as they came to be known in the Commission's regulations), the California Commission developed a device called a "standard offer." This was a prescribed form of fixed-price contract that the utilities were required to offer to all QFs seeking to sell power to them, and that was intended to become a legally binding mutual agreement immediately upon its

written acceptance by a QF (App. C, pp. 23-28; App. D, p. 3; see App. K, p. 29). The QFs were given a choice among several separate such "standard offers," which varied according to the price to be paid for the power, the duration of the contract, the extent of the obligations assumed by the QF with respect to guaranteed power deliveries, and various other terms and conditions (App. D, p. 3). Standard Offer No. 4, which is the particular agreement at issue here, provided for a firm delivery commitment by the QF and fixed long-term pricing based on the utility's forecast of its average system-wide avoided cost over the life of the contract (App. E, pp. 3-4).

In developing the terms of these standard offers and the rules governing their use, the Commission resolved several key issues of special significance to the present controversy. First, consistently with the FERC regulations, the Commission required each utility to extend its standard offers to all QFs wishing to sell power to it, regardless of whether they were located within or without the

utility's service area, and to accept "wheeled" power from out-of-area QFs on the same terms as those made available to QFs connecting directly with the utility's transmission system (App. C, pp. 108-12). In support of its ruling to this effect, the Commission expressly found that "it is not prudent for a utility to fail to pursue an otherwise beneficial facility simply because it is located in another service territory," that "the attractive feature of wheeling is that it introduces actual competition into the market," and that "wheeling is an important concept that can make a material contribution to cogeneration and small power production in California" (id., p. 110).

Secondly, the Commission rejected a request by the utilities for authority to refuse deliveries of QF power whenever load conditions were such that these deliveries would necessarily displace lower priced "economy power" from Northwest hydroelectric plants. The Commission correctly discerned that the FERC regulations did not permit refusals of QF deliveries on this ground, inasmuch as they

expressly restricted the circumstances justifying such refusals to those in which acceptance of QF power would "result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself" (App. C, pp. 72-73, 78, quoting 18 C.F.R. §292.304(f)). The Commission accordingly ruled that a utility's access to economy power from outside sources would not be viewed as a valid reason for refusing to purchase QF power, and that this factor should instead simply be taken into account in computing the utility's system-wide average avoided cost for the purpose of setting the price for purchases of power in its standard offer (App. C, pp. 72-78; App. D, p. 114; App. E, p. 38). As the Commission put it, "[a]nticipated economy purchases [are] to be averaged in the avoided cost applied for the entire time period" of the contract with each QF, and therefore "[t]here is no basis for refusing to purchase from such QFs merely because actual avoided costs occasionally go

below published prices" during periods when economy power is available (App. C, p. 78; App. D, p. 114).

Finally, the Commission went out of its way to assure QFs that their acceptance of a utility's standard offer would create a binding contract that would not be subject to retroactive abrogation or alteration. The Commission's ruling to this effect was based on its express recognition, echoing the similar concerns previously expressed by FERC and the draftsmen of PURPA, that "lenders and equity investors are reluctant to commit capital when a [QF] project's payment stream is ... uncertain" (App. E, p. 3). On the basis of this perception, the Commission specifically rejected a proposal by the utilities to include in their standard offers a "regulatory authority clause" that would have acknowledged the Commission's power to dictate retroactive changes in the terms of their purchase contracts with QFs (id., pp. 39-40). In that regard, the Commission stated (id.):

"In view of our holding that contracts

> entered into under Standard Offer #4 will not be subject to retroactive change based on prospective developments in the continuing saga of pricing QF power, we think the regulatory authority clause should be deleted. ... QFs contend that with the regulatory authority clauses in the contracts ... there will be insurmountable hesitation by lenders because of uncertainty. In ordering the clause removed we recognize that we cannot order retroactive changes to interim Standard Offer #4 contracts but ... we are willing to commit to that loss in flexibility."

This promise by the Commission to refrain from retroactive alteration of an accepted standard offer was thereafter repeatedly reaffirmed in several of the Commission's subsequent rulings (e.g., App. F, p. 64; App. K, pp. 27-29).

In reliance on these assurances and these rulings of the Commission, and on the consequent prospect of prices for QF power much higher than those that were available in the power-rich Northwest, Hydropool commenced the development of its interests in its various projects in Oregon and Washington with a view toward eventual sale of their power output to PG&E (App. S, pp. 3-4, 7-8). Hydropool's efforts in this regard consisted of securing financial commitments, assuring compliance of

its projects with the FERC definition of "qualifying facilities," consulting with PG&E about its development plans, and making arrangements for "wheeling" its power output to PG&E over the lines of other utilities (id., pp. 3-5, 8-10). These activities entailed the expenditure of substantial sums, which amounted to some $630,000 by the time of the Commission hearing in the proceeding that is under review here (id., p. 4).

3. PG&E's Transmission Constraints and the "Interim Solution". In the meantime, it had come to the Commission's attention that PG&E was experiencing serious transmission capacity constraints which it felt had been exacerbated by its obligation to accept deliveries of QF power (App. F, pp. 59-61). These problems affected nearly all of PG&E's bulk and area transmission lines in its northern territory, including, among others, the Pacific Northwest-Southwest Intertie ("the Intertie"), a 500KV interstate transmission line that runs from Washington through California and that serves as the vehicle for power deliveries to PG&E

from the Northwest utilities (App. U, pp. 3-11). After initially chastising PG&E for its belated disclosure of these difficulties and its failure to anticipate them in its transmission planning, the Commission ordered an investigation of the matter, with the declared objective, among others, of developing interim procedures for permitting QF development to go forward in PG&E's northern territory while PG&E undertook any enhancements to its transmission system that the Commission might find necessary to effect a permanent resolution of this problem (App. F, pp. 59-69, 99-100; App. G, pp. 42-50, 54-59).

The immediate product of this investigation was the so-called "interim solution," which was an arrangement originally developed at a negotiating conference among PG&E, the Commission's staff, and an association of California QFs known as the Independent Energy Producers (or "IEP") (see App. H, pp. 2-5). At that conference, the parties entered into a stipulation which required PG&E to undertake certain short-term capacity enhancements that

would permit its system to accommodate a limited additional quantity (initially 990 MW, later raised to 1150 MW) of QF power in return for the QFs' agreement to share in the cost of these measures according to a certain formula (id., p. 4). PG&E agreed that, on these conditions and pending the Commission's final decision regarding necessary permanent transmission enhancements, it would accept additional purchases of QF power, up to the specified limits, on a first-come-first-served basis (id.). By its terms, however, the stipulation was limited to QFs located in PG&E's service territory (id., pp. 7-8).

Hydropool and certain California QFs located beyond PG&E's service boundaries naturally objected to this latter condition and therefore requested that the Commission modify the stipulation to include out-of-area QFs (see id., pp. 7-8). PG&E opposed this request on the basis of its assertion that "unlimited amounts of QF power from outside PG&E's service territory could displace large amounts of more economic power" (id.). The Commission rejected

this argument and granted the request, finding that any additional displacement of economy power that might result from the inclusion of out-of-area QFs would necessarily be limited by the overall restriction on the total amount of QF power that PG&E was obligated to accept under the terms of the stipulation (id., pp.8-9). The Commission's ruling on this issue was as follows (id.):

> "We find that any interim solution should be afforded to all QFs affected by potential transmission constraints in PG&E's northern system. At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries. Both groups are willing to deliver power to PG&E's system under the same pricing formulas. ... We believe, as does PG&E in its planning, that there is no meaningful distinction between these QFs and will modify the stipulation as requested. ... However, we also find merit in the concern expressed by the Commission staff and PG&E that unlimited amounts of QF deliveries from outside PG&E's service territory could displace large amounts of more economic power. ... This problem can be solved by specifying a maximum level of QF development that may be interconnected under the interim solution. ... We will choose as the maximum level the total of the area capacity limitations agreed to by the negotiating parties in the stipulation or 990 MW. ... Subject to these ... modifications, we approve of the stipulation negotiated by the Commission staff, PG&E, and QF representatives and will adopt it as

an interim solution."

During these proceedings, several of Hydropool's projects had reached a stage of development sufficient to permit the acceptance of standard offers and the formation of contracts with PG&E (App. T, exhs. 13A, 13C). Shortly after the Commission's decision approving the inclusion of out-of-area QFs in the interim solution, therefore, Hydropool formally accepted and tendered to PG&E executed Standard Offer No. 4 contracts for seven of its projects, accompanied by a check for its share of the costs assessable against it under the Commission's rulings (id., exh. 13C). Although conceding that these contracts had been submitted in time to entitle Hydropool to a portion of the maximum purchase allotment permitted under the interim solution, PG&E nevertheless refused to accept the contracts (id., exh. 19). Instead, it immediately filed a petition, in which IEP also joined, asking the Commission to modify its recent ruling in such a way as to exclude all of Hydropool's projects from participation in the interim

solution (App. N).

The particular modification of the ruling sought by PG&E and IEP was the exclusion of all "QFs located outside of PG&E's service territory whose power output would flow on the Pacific Northwest-Pacific Southwest Intertie north of Round Mountain Substation" (App. N, p. 5). This was a euphemism for the exclusion of QFs located outside the state, because the only point of connection to the Intertie "north of Round Mountain Substation" was PG&E's Malin substation at the Oregon-California border, which was the only point at which power flowing from QFs in Washington or Oregon could practicably enter PG&E's transmission system, and which was not a practicable connection point for any QF located in California (App. U, att. 1).

Besides calling attention in this way to the out-of-state location of Hydropool's projects, PG&E and IEP offered no support for their petition to overturn the Commission's recent ruling other than the bare assertion that "the parties who negotiated the interim

solution never intended" that it would apply to projects connecting with the Intertie north of Round Mountain (App. N, p. 3). Nevertheless, in its initial ruling on the petition, the Commission declared that the question raised therein appeared to be "a significant matter" involving "broad policy questions" that could not be resolved without a full-scale evidentiary hearing (App. I, p. 5). The Commission accordingly directed that such a hearing should be conducted before an administrative law judge in conjunction with the ongoing hearings in the still pending investigation into possible final solutions to the overall problem of PG&E's transmission constraints (id.).

4. Suspension of Standard Offer No. 4 and the "Orphan Contracts" Decision. Ten months ultimately elapsed between the filing of PG&E's and IEP's petition for modification of the interim solution and the Commission's eventual decision on the merits of that petition, during which Hydropool's projects languished in limbo (App. S, pp. 10-11). Meanwhile, however, there

occurred another development that was to have an even more drastic effect on these projects. Five months after the filing of PG&E's and IEP's petition, the Commission suspended Standard Offer No. 4 in its entirety pending a long-term investigation looking toward a reduction in the prices to be paid to QFs under that offer (App. J, p. 3). The basis for the Commission's action was its finding that the recent decline in fuel prices and the increases in generating capacity arising from the unexpectedly high level of QF development had reduced the utilities' actual avoided costs to a level below the prices for QF power fixed in the standard offer (id., pp. 15-16, 22-23).

Some advance warning had been given of the impending suspension of Standard Offer No. 4, and more than 200 additional QF contracts had therefore been executed and tendered to the utilities immediately prior to the entry of the suspension order, among which were seven additional contracts tendered by Hydropool (App. K, pp. 5,7). To avoid prolonging what it called this "gold rush" of last-minute

contracts, the Commission declared that its order announcing the suspension would be made effective immediately (App. J, p. 3). The Commission also made clear, however, that the order would only apply prospectively, and that it was accordingly not intended to nullify any standard offer contract that had actually been executed prior to the date of the order (id., pp. 32-33).

A controversy nevertheless arose regarding the application of the suspension order to several contracts that were in various states of completion on the date of its entry (App. K, pp. 2-7). The utilities maintained that an effective contract had not been formed as of that date in any case where the utility itself had not yet countersigned the QF's executed standard offer, where the offer had been executed by the QF without curing various alleged imperfections in its form, or where the utility had not yet completed the "interconnection study" and "special facilities agreement" that it was required to carry out for each QF contract under the Commission's

rules (id., pp. 4-7, 18-20). Among the contracts challenged in this manner were all of the contracts tendered by Hydropool, including not only those that had been executed immediately before the suspension order, but also the seven contracts that had been tendered to PG&E several months earlier and were being held in abeyance pending the outcome of PG&E's and IEP's petition to modify the interim solution (id., p. 19).

In what came to be known as its "orphan contracts" decision (App. K), the Commission rejected all of the utilities' contentions on these issues - with one notable exception. Reiterating its earlier rulings to the effect that a QF's mere execution of a standard offer was sufficient to create a "complete contract" that would "not be subject to retroactive change" through the exercise of the Commission's "regulatory authority" or otherwise, the Commission generally held that all standard offers executed by QFs prior to the date of the suspension of Standard Offer No. 4 were binding contracts which were not

affected by the suspension, and that any imperfections in the terms of any of these contracts, including the lack of a completed "interconnection study" or "special facilities agreement," would be subject to cure within a reasonable time after the date of its decision (id., pp. 23-37). The same result was reached regarding two projects for which the QFs had not even signed the standard offer as of the critical date, with respect to which the Commission found that effective contracts had nevertheless been formed because the QFs had clearly indicated that they were ready to sign the standard offer and had only been prevented from doing so by various actions or representations of the utilities (id., p. 37; App. M).

When it came to what it called the "special case" of Hydropool, however, the Commission chose a different tack. Finding that the validity of Hydropool's contracts could not be determined without addressing the merits of PG&E's and IEP's still pending petition to exclude Hydropool's projects from the interim

solution, the Commission held simply that "[t]he ability of Cogeneration Services, Inc., and Hydropool to enter such agreements should be determined by the decision in that proceeding" (App. K, p. 44). The Commission otherwise declined to discuss the status of any of the contracts that had been tendered by Hydropool (id., pp. 37, 44).

5. Abrogation of Hydropool's Contracts. Simultaneously with the proceedings surrounding the suspension of Standard Offer No. 4, the parties were engaged in conducting the consolidated evidentiary hearings ordered by the Commission on the status of Hydropool's projects and the long-term solution to PG&E's transmission constraints. In those hearings, PG&E and IEP, obviously mindful of the constitutional difficulties that would attend a straightforward exclusion of out-of-state QFs from the terms of the interim solution, attempted to support their request for this relief by adducing evidence of two other alleged distinguishing factors that they claimed would justify the exclusion of

Hydropool's projects.*

First, they pointed out, through testimony of PG&E's employees, that Hydropool's output would enter PG&E's system on the Intertie at a point where no other PG&E transmission lines were connected, that it would therefore necessarily flow on the Intertie at least as far as the next substation at Round Mountain, and that it would thus displace economy power from the Northwest utilities "on a one-to-one basis" during those limited times in which the capacity of the Intertie would otherwise be entirely occupied with the transmission of these low-priced imports (App. W, pp. 71, 78; App. X, p. 18). By contrast, according to these witnesses, the output of all other QFs entered the system at points at which other

---

* PG&E also raised certain technical objections to the validity of Hydropool's contracts, contending, for example, that the terms of Standard Offer No. 4 were not appropriate for out-of-area QFs and that the contracts were not valid until agreement had been reached on interconnection facilities (App. K, p. 19; App. O, pp. 3-4). These contentions were patently unsound, having been rejected by the Commission, as noted above, on numerous prior occasions, and they were accordingly ignored by both the administrative law judge and the Commission (see Apps. B, O).

PG&E transmission lines could be used to divert or withhold their output from the Intertie in order to avoid this sort of displacement effect whenever sufficient excess capacity on those other lines was available for this purpose (id.; App. X, pp. 46, 371).

These same witnesses admitted, however, that this supposed special feature of Hydropool's projects was of very little, if any, practical significance. They conceded that, whenever the capacity of the Intertie was so overloaded that the acceptance of QF power would cause a displacement of economy imports, it was likely that most of PG&E's other area and bulk transmission lines would be similarly overloaded, and that these lines therefore would often be unavailable to prevent the displacement of economy power by diverting QF power from the Intertie (App. U, pp. 9-10; App. V, pp. 4, 6; App. X, pp. 37, 49, 52, 358-65, 368-72). The result of this fact, these witnesses admitted, was that the output of the California QFs would ordinarily flow onto the Intertie and displace economy imports under

most of the same conditions and in the same manner as would Hydropool's output (id.). Indeed, it was conceded that the total financial effect on California's ratepayers of the displacement thus caused by the 1150 MW of additional power already allotted to California QFs under the interim solution would be vastly greater than anything that might ensue from the addition of Hydropool's output of only 66.2 MW (id.; App. U, p. 16).

The second ground proffered by PG&E and IEP for distinguishing Hydropool's projects was likewise shown to be insubstantial. They pointed out, in this regard, that the short-term capacity enhancements contemplated by the interim solution encompassed only the area transmission lines on which the California QFs' output would enter the system and excluded any enhancements to the Intertie such as would be necessary to accommodate additional QF power on that line (App. W, p. 91; App. X, pp. 16, 37, 40). This fact, while true, was obviously incapable of justifying any differential treatment of Hydropool, however, because, as

noted above, the power output of the California QFs would overflow onto the Intertie in any event during nearly all of those times at which the Intertie would otherwise be so overloaded with Northwest imports as to be unable to accommodate Hydropool's output (App. U, pp. 9-10, V, pp. 4, 6; App. X, pp. 37, 49, 52, 358-65, 368-72). In any case, it was also shown that PG&E's plans for long-term capacity enhancements included an expansion of the capacity of the Intertie sufficient to accommodate all of Hydropool's output, so that any difference that might exist between Hydropool and the California QFs in this respect would be temporary at most (App. U, p.12, att. 10; App. X, pp. 37, 42-44).

For its part, Hydropool presented expert testimony corroborating the lack of any genuine difference between the situations of Hydropool and the California QFs. In addition, Hydropool's principal officer testified that he had offered to PG&E, and would still offer, to negotiate special arrangements with the Northwest utilities who would be "wheeling"

Hydropool's output to PG&E whereby this output would be "banked and stored" during periods in which the Intertie was fully loaded with economy imports (App. X, pp. 834-41). In this manner, Hydropool's deliveries could be diverted from the Intertie to avoid displacement of economy power under the same circumstances in which PG&E could accomplish this result with respect to power delivered by California QFs over its own transmission lines (id.).

Based on all of this testimony, the administrative law judge found as follows (App. O, p. 8):

> "From these facts, one may find a few differences between QF interconnection to the Intertie and to other constrained transmission lines. ... [D]irect interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PG&E's capacity entitlement. Interconnection to other transmission lines will cause displacement only when such power is available and uncurtailed area generation exceeds area load. Consequently, the amount of displacement from QF interconnection to the Intertie may exceed any Intertie backoff caused by other QF interconnection to other lines."

The judge concluded, however, that these

"differences" were insufficient to justify a recommendation that the Commission exclude Hydropool from the terms of the interim solution, and he therefore simply forwarded the record to the Commission without any ruling one way or the other on the question whether PG&E's and IEP's petition for this relief should be granted (id., p. 9).

The Commission's final ruling on the petition was rendered in the same decision in which it established its guidelines for the long-term alleviation of the overall problems created by PG&E's transmission constraints (App. B). In the portion of its opinion relating to the petition to exclude Hydropool, the Commission candidly acknowledged that the issue raised by the petition was nothing more nor less than the "general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection" to PG&E's transmission system (id., p. 16a). The Commission proceeded to resolve that issue against Hydropool in a brief discussion which merely parroted the findings of the

administrative law judge, held that these findings afforded "a rational basis" for excluding Hydropool from the interim solution, granted PG&E's and IEP's petition for that relief, and directed the commencement of a new proceeding to investigate any further "unresolved questions relating to the desirability of purchasing power from out-of-state QFs" (id., pp. 16-17a). Because of the Commission's intervening ruling in the "orphan contracts" case to the effect that the validity of Hydropool's standard offer contracts would depend upon its eligibility to participate in the interim solution, the Commission's denial of that right to Hydropool in this decision necessarily had the further effect of abrogating those contracts. One commissioner dissented from the Commission's ruling (id., p. 18).

6. The Proceedings Below. Hydropool petitioned for rehearing of the Commission's decision, raising all of the legal and constitutional arguments which are raised in this proceeding (App. P). The Commission

failed to act on the petition within 60 days of its filing, and it was therefore deemed denied by operation of law. Cal. Pub. Utils. Code §1733(b). Hydropool and Cogeneration Services then filed a petition for review of the decision, on all the same grounds, in the California Supreme Court, which is the only tribunal empowered to review the Commission's decisions under California law (App. Q). Id. §1759. Three weeks after the filing of this petition, and while the Commission's counsel were in the process of preparing its response, the Commission spontaneously issued a new order, ostensibly addressed to Hydropool's earlier petition for rehearing which it had already effectively denied (App. L). This new order, however, made no change whatsoever in the substance of the Commission's ruling, but rather merely attempted to "clarify" it by expounding various protestations of innocent intent with respect to the apparent discriminatory character of the ruling (id.).

Hydropool's petition for review of the Commission's decision was thereafter denied

without opinion by the state Supreme Court, with one justice dissenting (App. A). As stated above, this denial was the equivalent of a ruling on the merits affirming the decision under California law (see authorities cited at page 2, supra). This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

1. The Commerce Clause. The standards for determining the validity of state regulations challenged under the Commerce Clause are well settled and may be briefly stated. In its recent opinion in Maine v. Taylor, __ U.S. __, 106 S.Ct. 2440 (1986), this Court summarized those standards as follows (id. at 2447-48):

> "In determining whether a state has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. The Court expained in Hughes v. Oklahoma, 441 U.S. 332, 336 (1979), that once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the state to

> demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means. See, also, e.g., Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1982); Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)."

The ruling of the Commission at issue here clearly falls within the latter of the two categories enumerated by the Court in this passage - that is, state regulations that affirmatively discriminate against interstate commerce. The Commission itself frankly conceded as much when it characterized the petition to exclude Hydropool as presenting "the general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection" with the transmission lines of California utilities (App. B, p. 16a). And in any event, since "[t]he Commerce Clause forbids discrimination whether forthright or ingenious" (Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940)), the same conclusion would follow even if the Commission had acceded to PG&E's and IEP's suggestion that it eschew candor and couch its order as a

facially neutral exclusion of "QFs located outside PG&E's service territory whose power output would flow on the ... Intertie north of Round Mountain Substation" (App. N, p. 5). For, as was shown above, the only point of connection to the Intertie "north of Round Mountain Substation" also happens to be the only practical point of entry into PG&E's system for power generated by QFs situated outside California and is not a practical connection point for any QF situated within the state (App. U, att. 1). Thus, whatever formulation is chosen, the ultimate effect of the Commission's ruling is to exclude out-of-state QFs from participating in sales of power to PG&E on the terms and conditions which are simultaneously being offered to QFs located in California. As such, the ruling is plainly discriminatory and, under the decisions of this Court, must therefore be deemed to "invoke the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes v. Oklahoma, supra, 441 U.S. at 337. Accord,

Maine v. Taylor, supra.

The record in this case leaves little doubt that the Commission's order cannot survive such strict scrutiny. As for any "legitimate local purpose" that might have been served by the order, the previous decisions of the Commission itself have eliminated nearly all of the arguably legitimate local concerns that might have satisfied this requirement. Thus, while it is true that Hydropool and other out-of-state QFs may displace economy imports from the Northwest utilities under certain circumstances, the Commission has consistently ruled, in assessing the same effect arising from deliveries of power by California QFs, that this factor is not sufficient to justify refusing such deliveries in the light of the overriding interest in encouraging the development of QF power (App. C, pp. 72-78; App. D, p. 114; App. E, p. 38; App. H, pp. 8-9). Similarly, although Hydropool's power would need to be "wheeled" to PG&E over the transmission lines of other utilities, the Commission has repeatedly determined, in

adjudicating the rights of California QFs to deliver power to utilities from outside their service territories, that any burden on the purchasing utility that might attend this practice is overborne by both the express mandate of the FERC regulations and the ability of "wheeling" to "make a material contribution to cogeneration and small power production in California" through the "introduc[tion of] actual competition into the market" (App. C, p. 110; see also App. H, pp. 8-9). Finally, while the Commission has found that the limited capacity of PG&E's transmission system imposes some real short-term constraints on QF development in its northern territory, it has nevertheless required PG&E to continue accepting deliveries of QF power in that area within certain prescribed limits, and has specifically reaffirmed that these constraints do not afford an excuse for PG&E to refuse such deliveries whenever they would displace economy imports or require "wheeling" from out-of-area QFs (App. H, pp. 8-9). Thus, while all of these problems might have been deemed to

constitute "legitimate local purposes" for the exclusion of Hydropool's output from the market in other possible circumstances, the Commission's own denial of their legitimacy in the context of its adjudications of the rights of California QFs has decisively foreclosed each of these potential avenues of defense for the validity of the ruling in question here. If anything, the existence of these factors and the Commission's treatment of them in its various earlier decisions has merely served to heighten the discriminatory impact of that ruling.

The only remaining possible justification for the Commission's discrimination against Hydropool is the finding of the administrative law judge regarding the significance of the fact that deliveries from out-of-state QFs would enter the Intertie at a point at which no other PG&E transmission lines are connected. As noted above, he found that this circumstance might entail a proportionally greater displacement of economy power under some circumstances than the displacement caused by

California QFs whose output would enter the Intertie at other points at which it could sometimes be diverted to other lines during periods of overload. As was demonstrated earlier, however, the practical effect of this distinguishing factor was trivial at best, because PG&E's other lines would normally be fully loaded and consequently unavailable for such diversion at precisely those times at which the Intertie itself was overloaded. The output of the California QFs would therefore generally displace economy power in the same manner as Hydropool's output, and the ultimate financial impact of this displacement on California's ratepayers would be vastly greater in absolute terms than anything that might ensue from the acceptance of Hydropool's deliveries. The judge himself accordingly held that this factor was insufficient to justify a recommendation to exclude Hydropool from the terms of the interim solution (App. O, p. 9). The Commission likewise afforded only passing mention to this concern in its ultimate decision granting PG&E's and IEP's petition for

this relief, and chose instead to ground its ruling upon a broadly phrased catalog of "the problems of how to deal with out-of-state QFs" (App. B, p. 16a).

Given these implicit acknowledgments of the insignificance of this alleged distinguishing factor, it can hardly be accorded sufficient weight to justify the Commission's otherwise patently discriminatory order. At most, as the Commission itself appeared to concede in its opinion, this factor might be viewed as furnishing the sort of minimal "rational basis" that might sustain the order against a challenge under the Equal Protection Clause. However, as this Court explained in its recent opinion in Metropolitan Life Ins. Co. v. Ward, __ U.S. __, 105 S.Ct. 1676 (1985), that relatively lax standard has no place in the very different context of Commerce Clause adjudication, where the state's asserted interest in the challenged regulation must additionally be "weighed against the burden the state law would impose on interstate commerce." Id. at 1683. See e.g., Lewis v. BT Investment

Managers, Inc., 447 U.S. 27, 42-44 (1980); Hunt v. Washington State Apple Advertising Comm., supra, 432 U.S. at 352-53; Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). When it is further recalled that any claimed justification for an affirmatively discriminatory regulation must be subjected to "the strictest scrutiny" with respect to both its importance and the motives for its assertion, there can remain no serious question that the minor technical differences in transmission methods cited by the administrative law judge cannot serve as a sufficiently consequential "legitimate local purpose" to justify the ruling at issue here. Lewis v. BT Investment Managers, Inc., supra; Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Hughes v. Oklahoma, supra; Pike v. Bruce Church, Inc., supra.

In any event, even if this factor could fulfill the role of a "legitimate local purpose," appellees plainly could not clear the additional hurdle erected by the requirement of an "absence of nondiscriminatory alternatives"

for the promotion of the state's interests. Hughes v. Oklahoma, supra, 441 U.S. at 337; Maine v. Taylor, supra, 106 S.Ct. at 2447-48. In fact, the record in this case abounds with suggestions of alternative nondiscriminatory means by which those asserted interests might have been served, most of which, once again, emanate from the opinions of the Commission itself. Thus, for example, the Commission determined at the outset that exclusion of the output of particular QFs or refusals to accept particular power deliveries were not a proper response to the problem of displacement of economy imports, because this problem could be solved by simply taking such displacement into account in calculating each utility's system-wide avoided cost for the purpose of determining the price to be paid under its standard offers (App. C, pp. 72-78). Similarly, when the Commission was later faced with the exacerbation of this problem caused by PG&E's limited transmission capacity, it specifically rejected PG&E's request to exclude out-of-area QFs from the interim solution as a

means of avoiding additional displacement of economy power, and instead chose to resolve this difficulty by simply imposing a maximum limit on the quantity of QF power that PG&E would be required to accept pending the alleviation of these constraints (App. H, pp. 8-9). Finally, an additional, fully effective method of avoiding any adverse effects that might particularly ensue from the acceptance of Hydropool's output was proposed by Hydropool's principal witness, who, as noted earlier, offered to negotiate arrangements with its "wheeling" utilities whereby Hydropool's power could be "banked and stored" during conditions of overload on the Intertie so as to resolve the displacement problem in precisely the same manner that PG&E was attempting to resolve it by diverting the output of California QFs onto other transmission lines of its own (App. X, pp. 834-41).

All of these alternative methods of advancing the state's interest in preserving economy imports were found acceptable, indeed wholeheartedly embraced, by the Commission in

adjudicating the rights of California QFs. Only in the "special case" of Hydropool did the Commission choose, without explanation, to reject these alternatives in favor of a blanket exclusion of Hydropool from the terms of the interim solution and a complete abrogation of its purchase contracts with PG&E. The conclusion is unavoidable that this action on the part of the Commission represented "a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." Hughes v. Oklahoma, supra, 441 U.S. at 338. Accord, Hunt v. Washington State Apple Advertising Comm., supra, 432 U.S. at 354.

Thus, under the rules enunciated in the opinions of this Court, the decision of the Commission plainly violates the Commerce Clause and indeed represents a classic instance of precisely the sort of parochial exclusionary measure that this constitutional provision was intended to prohibit. When all is said and done, the evident import of the Commission's

decision, if not its conscious intention, is to deny access by out-of-state power producers to California's electrical transmission facilities, to insulate California's small power production industry from out-of-state competition, and to relieve California's ratepayers from their share of the burden of contributing to the national objective of developing alternative sources of energy. All of these types of illegitimate purposes and effects have been condemned by this Court in many prior cases, and they should suffer the same censure in this case. E.g., New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); Lewis v. BT Investment Managers, supra; Philadelphia v. New Jersey, supra; Hughes v. Oklahoma, supra; Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Baldwin v. Seelig, 294 U.S. 511 (1935).

The ruling of the Commission, moreover, reflects more than mere error or injustice to appellants. In addition - and this is the reason the issue particularly merits plenary consideration by the Court - the Commission's

action threatens the complete frustration of an important national program. As noted above, the purpose of the congresssional enactment mandating the promotion of cogeneration and small power production, from which the Commission ultimately derived its authority to adopt the regulations at issue here, was to alleviate a nationwide dependence on foreign oil imports that was perceived as undermining the national security and international influence of the United States. FERC v. Mississippi, supra, 456 U.S. at 745-46, 755-57. For obvious reasons, this preeminently national goal can be effectively advanced only if the various states pursue a cooperative approach in which the more populous states that are most likely to provide a market for such alternative forms of energy agree to open their borders to the importation of power from the resource-rich states in which that power can be most efficiently generated. By the action of the Commission in this case, California has rejected this approach in favor of a parochial policy that seeks only the advancement of its

own isolated interests. Although it has enthusiastically endorsed the goal and accepted the costs of promoting alternative energy production within its own borders, it has refused access to its markets and its transmission facilities by competing small power producers in its neighboring states, even while it has continued to avail itself of the benefits of cheap hydroelectric power from those states' major utilities. It is, in other words, pursuing a program of energy self-sufficiency for California while frustrating the achievement of that same objective for the nation as a whole. Quite plainly, if its insular approach were to be sanctioned by this Court and imitated by many other states, the entire objective of the congressional enactment would be set at naught. It is to prevent this untoward result, as well as to remedy the Commission's denial of Hydropool's constitutional rights, that the Court ought to accept this case for plenary review.

2. The Contract Clause. The inducement for the Court to entertain appellants' Contract

Clause claim is quite different from the reason that justifies review of their Commerce Clause claim. The latter claim, as was just demonstrated, involves an obvious violation of well settled constitutional requirements. The claim under the Contract Clause, by contrast, admittedly depends upon principles that are anything but well settled. It is for that very reason, however, that plenary consideration of this claim is nevertheless warranted. As will now be shown, an undesirable degree of uncertainty presently afflicts the law in this area of constitutional jurisprudence, and the particular facts of this case happen to afford an ideal opportunity for the resolution of much of this uncertainty.

The course of judicial interpretation of the Contract Clause has not run smooth. From its position of prominence in nineteenth century constitutional doctrine, the Clause was later reduced to such a state of "comparative desuetude" in the middle decades of this century that one respected commentator was led to observe that it might as well have been

"dropped out of the Constitution." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978), quoting Hale, The Supreme Court and the Contract Clause, 57 Harv.L.Rev. 852, 890-91 (1944). The clause was given renewed vitality, however, by two decisions in the 1976 and 1977 terms of this Court, in which the Court declared that "the Contract Clause ... is not a dead letter," and proceeded to apply it to invalidate a New Jersey law repudiating a state's covenant with the bondholders of a port commission and a Minnesota law retroactively increasing the pension funding obligations of certain classes of employers. Allied Structural Steel Co. v. Spannaus, supra at 241; United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). But the extent of this renascence was in turn cast in doubt by another pair of decisions in the 1982 term, in which the Court upheld, against Contract Clause challenges, state laws imposing a price ceiling on natural gas purchases and prohibiting a contractually mandated pass-through from producers to royalty owners of certain newly enacted severance taxes

on oil production. Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983).

As is perhaps inevitable in any area of the law in which results are dictated by a "balancing test," these four most recent decisions of this Court under the Contract Clause are not easy to reconcile and produce no clearly intelligible standard of validity for state laws challenged under this provision. All four opinions undertook the same task of "harmonizing" the "facially absolute ... language of the Contract Clause against the State's interest in exercising its police power;" and each opinion reviewed the same set of "relevant factors" in carrying out this task. E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra at 410, 411-12, 417-19; United States Trust Co. v. New Jersey, supra at 15, 21, 28-31. Nevertheless, the results of the decisions and the apparent weight given to these various "factors" in reaching those results differ markedly between

the 1976-77 decisions and the two decisions rendered in the 1982 term. Compare, e.g., United States Trust Co. v. New Jersey, supra at 29-31, and Allied Structural Steel Co. v. Spannaus, supra at 247, with Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra at 411-12.

This apparent disparity has engendered a similar divergence in the lower courts' approaches to Contract Clause issues and has invoked much speculation and disagreement in the legal community regarding the present content of the principles that should govern the disposition of claims asserted under that Clause. Compare, e.g, Troy, Ltd. v. Renna, 727 F.2d 287, 296-97 (3d Cir. 1984), with Minnesota Assn. of Health Care Facils. v. Minnesota Dept. of Welfare, 742 F.2d 442, 450-51 (8th Cir. 1984). See Epstein, Toward a Revitalization of the Contract Clause, 51 U.Chi.L.Rev. 703 (1985); Note, Rediscovering the Contract Clause, 97 Harv.L.Rev. 1414 (1984). On the one hand, some observers have maintained that the decisions in the 1982 term represent nothing

less than a reinterment of the Contract Clause that effectively relegates the two earlier decisions to the status of mere "traces" of revived judicial concern for Contract Clause values which have "fade[d] as quickly and quietly as they appear[ed]." Epstein, supra, 51 U.Chi.L.Rev. at 703-4. Others, however, have adopted a more sanguine view that seeks to derive a consistent rule from the two pairs of decisions, and to preserve something of the constitutional guarantee, by pointing to various distinguishing factors that plausibly explain and reconcile these decisions' disparate results. E.g., Note, supra, 97 Harv.L.Rev. at 1427-29.

The distinguishing factors most prominently relied upon to support this latter viewpoint are (1) the differing degrees to which the state had induced the challenging party, in each of these cases, to "arrange [his] affairs with conscious reliance on preexisting legal rights," and (2) the degree to which the challenged legislation in each case appeared to impose special burdens on "narrow, identifiable

classes," especially those enjoying little political power at the local level. E.g., id., 97 Harv.L.Rev. at 1428. See Minnesota Assn. of Health Care Providers v. Minnesota Dept. of Welfare, supra at 451. Thus, it has been pointed out that United States Trust Co., supra, and Allied Structural Steel Co., supra, involved, respectively, a state's repudiation of its own express promise and an unexpected entry by the state into a previously unregulated area of its economy, while Energy Reserves Group, supra, and Eagerton, supra, involved the mere continued regulation of activities that were already heavily regulated and as to which the parties could reasonably have expected continued assertions of the state's power to adjust their rights to changing conditions. Id.. Similarly, it has been correctly observed that the laws at issue in U.S. Trust and Allied were both narrowly aimed at the alteration of a particular group's contractual rights, while Energy Reserves and Eagerton dealt instead with laws that were primarily prospective and general in their

scope and that only incidentally effected a modification of existing agreements. Id.. On the basis of this analysis, it is concluded, by those espousing this view, that all of these cases can be reconciled, and that the renewed judicial willingness to enforce the Contract Clause that was manifested in the earlier pair of decisions is therefore still viable, having merely been qualified in certain respects, rather than nullified, by the two decisions rendered five years later. Id..

This case affords an ideal vehicle for this Court to resolve the existing uncertainty on this issue by clearly indicating whether the view just stated is correct and whether the Court's decisions can indeed be reconciled in this manner, or whether, on the other hand, the Court's earlier indications of renewed interest in enforcement of the Contract Clause have, after all, simply "fade[d] as quickly and quietly as they appear[ed]." Epstein, supra at 704. For the facts of this case exhibit, in the most vivid possible manner, both of the factors by which such a reconciliation of these

decisions could be undertaken if the Court were so minded.*

Thus, first of all, these facts probably exemplify a more deliberate inducement by a state agency of "conscious reliance on preexisting legal rights" than has ever been presented in any case before this Court. Compare Wood v. Lovett, 313 U.S. 362, 371 (1941). The Commission in this case not only expressly promised that Hydropool's standard offer contracts, once executed and tendered, "will not be subject to retroactive change based on prospective developments," but also issued this guarantee for the declared purpose of eliminating any "hesitation by lenders because of uncertainty" regarding the enforceability of these contracts, and of thus deliberately inducing the very substantial

---

* It should be noted, by way of disposing of one potential threshhold issue presented by these facts, that the order of the Commission at issue here is clearly a "law" within the meaning of the constitutional prohibition against any "Law impairing the Obligation of Contracts." Appleby v. Delaney, 271 U.S. 403, 413-14 (1926); Atlantic Coast Line R.Co. v. Goldsboro, 232 U.S. 548, 555 (1914); Grand Trunk Western R.Co. v. Railroad Comm., 221 U.S. 400, 403 (1911).

investments that Hydropool eventually made in reliance on this promise (App. E, pp. 3, 39-40). Compare United States Trust Co. v. New Jersey, supra at 18, 31-32. In addition, being mindful of the fact that investors might feel a particular hesitancy to commit their capital to a highly regulated industry that was traditionally subject to continuous governmental oversight, the Commission went out of its way to reassure them on this score by expressly disclaiming its authority in this regard and by specifically ordering the utilities to delete from their standard offers a clause that would have preserved its customary regulatory prerogatives (id.). Compare Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra at 411, 416.

Similarly, with respect to the second factor that might serve to reconcile the Court's decisions on these issues, this case clearly involves a ruling that has worked to the particular detriment of a "narrow, identified class" of politically disadvantaged entities. The immediate effect of the ruling

was to abrogate the contracts of Hydropool and Cogeneration Services alone, a narrower class than which can hardly be imagined. Compare Allied Structural Steel Co. v. Spannaus, supra at 247-48. And even though the broader purpose of the Commission's order is to prescribe an exclusionary rule for out-of-state QFs in general, that class, although certainly more numerous, is no less disadvantaged by its relative inability to influence the local political process in such a way as to alleviate the discrimination that has been perpetrated against it. Compare United States Trust Co. v. New Jersey, supra at 61-62 (Brennan, J., dissenting). See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 151 (1978) (Blackmun, J., dissenting).

In short, if there is any remaining vitality in the protections afforded by the Allied and U.S. Trust decisions against a state's betrayal of the deliberately induced expectations of a narrow class of credulous investors, this case affords the opportunity for this Court to indicate as much. By

accepting the case for plenary review, the Court can resolve the existing uncertainty on this issue and give the lie to those skeptics who have doubted whether even this much remains of those decisions. The Court should not shun this opportunity.

CONCLUSION

For these reasons, appellants respectfully submit that the Court should note probable jurisdiction of this appeal and set the case for briefing and argument on the merits.

Dated: October 24, 1986

Respectfully submitted,

JAMES E. HARRINGTON
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
Attorneys for Appellants

86-686

No. _____

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDICES TO JURISDICTIONAL STATEMENT

VOLUME I (of 3 Volumes)
Appendix A through F

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

128 pp

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDICES TO JURISDICTIONAL STATEMENT

VOLUME I (of 3 Volumes)
Appendix A through F

Original page numbers appear at bottom of pages and in [ ] throughout the text.

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

ORDER DENYING WRIT OF REVIEW

S.F. No. 24966

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Cogeneration Services Incorporated,

Petitioners

v.

Public Utilities Commission, Respondent;

Pacific Gas and Electric,

Real Party in Interest

Petition for writ of review DENIED.

Mosk, J., is of the opinion the petition should be granted.

/s/

Chief Justice

Decision 85-09-058 September 18, 1985

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on con-generation and small power production development.	)	I.84-04-077 (Filed April 18, 1984)

(See Decisions 84-08-037 and 85-01-038 for prior appearances.)

Additional Appearances

Ann P. Cohn, David N. Barry, III, and Jennifer Moran, Attorneys at Law, for Southern California Edison Company, respondent.

Graham & James, By James Squeri, Attorney at Law, for Union Oil Company of California; Neal A. Johnson, for California Waste Management Board; Robert Logan, for himself; Alicia Torre, for International Power Technology; and Margaret Rueger, for U.S. Windpower, Inc.; interested parties.

O P I N I O N

I. Summary

By this order, we close an investigation into transmission limitations in utility systems which may affect the development of

Qualifying Facilities(QF). We find that Pacific Gas and Electric Company (PG&E) may have significant constraints in its northern system. The other two utilities, Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E), should not have significant transmission constraints. [2]

II. Background

On April 18, 1984, the Commission issued Order Instituting Investigation (I.) 84-04-077 to examine alleged transmission constraints in PG&E's transmission system which would affect QF development. The Commission also wanted to assess the extent of any limitations in other utilities' transmission systems which would affect QF development.

The respondent utilities filed statements of anticipated limitations on their bulk and area transmission systems over the next ten years which may affect QF development. In

these statements,only PG&E predicted that it would have significant constraints in its northern transmission system.

After submission of the utilities' statements, the Public Staff Division (staff) held several workshops at which an interim solution was developed for PG&E's northern transmission system, a milestone procedure for QF development was formulated, and transmission cost allocation approaches were discussed. (See Decision (D.) 84-08-037 and D.85-01-038.) The participants in the staff's workshops were able to resolve several issues and thereby reduce the need for formal hearings.

Hearings were held from April 8-12, 1985 on three subjects: utilities' transmission constraints, cost allocation approaches, and access to the Pacific Northwest-Pacific Southwest 500 kilovolt (kV) Intertie (Intertie) under the terms of the interim solution (see Appendix A). PG&E, Edison,

SDG&E, Sante Fe Geothermal, Inc. and Ultrasystems, Inc. (Ultrasystems), Indepentent Energy Producers (IEP), Cogeneration Services, Inc. - Hydropool (Hydropool), and staff presented witnesses. Concurrent briefs were filed by May 24, 1985.

[3]

III. Transmission System Limitations

A. PG&E's Transmission System

1. Transmission Constraints

James H. Malinowski, PG&E's Chief Transmission Planning Engineer, testified that transmission capacity is not currently available in some areas of PG&E's northern system. Malinowski stated that from 1980 to 1984, the megawatts (MW) of signed QF contracts increased from 204 MW to 6,593 MW. Malinowski asserted that this unexpected increase in QF power exceeded available transmission capacity in its northern system.

According to Malinowski, the availability of transmission capacity is

dependent on existing and future load levels as well as existing and future generation. In PG&E's northern area,generation consists of area hydro, imports, geothermal, Rancho Seco, other entities, and QFs. This anticipated generation will exceed the expected load during certain hours of each year for the next ten years.

In PG&E's southern area, the company is monitoring the development of large enhanced oil recovery projects to determine if capacity constraints will emerge.

Malinowski sponsored the following table showing that the northern system already has a resource-load imbalance:

[4]

Load, Excluding System Line Losses (MW)
and
Resources, Excluding Northwest Import (MW)

Main Area	Installed Capacity	Typical Resources On Line	Peak Load	Surplus Resources	Resources Needed to Meet Load
Northern	8,892	7,290	5,328	1,962	-
Bay Area	4,670	2,232	5,540	-	3,308
Southern	7,290	5,366	5,062	304	-

Northern Area includes SMUD and Humboldt, Shasta, Colgate Drum, De Sabla, North Bay, Sacramento, and Stockton Divisions.

Bay Area includes San Francisco, East Bay, and San Jose Divisions.

Southern Area includes MID, TID, and San Joaquin and Coast Valleys Divisions.

Malinowski stated that most of the northern area's 1,962 MW of surplus resources will be transmitted to meet Bay Area load. According to Malinowski, this transfer of power will fully load some bulk transmission lines. As a result, any additional QF power in the northern area would cause these transmission lines to overload.

PG&E has conducted a study to determine which lines would be overloaded during the summer peak and the spring partial peak periods. This study showed that the existing bulk transmission system had no available capacity for firm deliveries of QF power. Malinowski testified that under normal conditions the following 230 kV lines and 500 kV capacitors would be overloaded:

a. Gold Hill-Tesla

b. Ranch Seco-Tesla

c. Bellota-Tesla Nos. 1 and 2

d. Tracy-Tesla Nos. 1 and 2

e. Vaca-Dixon-Contra Costa Power Plant (CCPP) Nos. 1 and 2

f. Vaca-Dixon-Moraga Nos. 1 and 2

g. Round Mountain-Table Mountain 500 kV series capacitors.

[5] Malinowski also testified that constraints exist in several area transmission systems within the northern system. In most of these areas, which are rural or suburban, the load and expected load growth is small compared to urban areas. Consequently, existing transmission lines are of relatively low capacity. In addition, the area generation often exceeds the area load. The following table shows the available transmission capacity in the northern areas:

Sub Area	Load (MW) Maximum (A')	Load (MW) Minimum (A)	(MW) Existing and Planned Generation (B)	(MW) Maximum Export (C)=(B-A)	(MW) Existing Transmission Capacity (D)	(MW) Available Transmission Capacity (E)=(D-C)	(MW) Potential QF Generation**** Allocated	(MW) Potential QF Generation**** Wait List
Humboldt Division Includes Trinity County - Shasta	130	40	128	88	88	0-90*	90.0	136.5
Pit 1 System	19	5	106	101	106	5	4.5	40.0
Cedar Creek 60 kV Area	3	1	7	6	16	10	27.0	0.5
Battle Creek 60 kV Area	3	2	38	36	36	0	4.5	4.0
Caribou 60 kV Area	75	34	78	44	84	40	70.0	20.0
Feather River Area	0	0	339**	339	390	51		
Paradise 60 kV Area	40	16	38	22	37	15	0.5	63.0
Colgate 60 kV Area	52	17	417	365***	365	0	20.5	12.0
North Bay North	220	132	245	113	113	0	20.0	59.0
North Bay South	865	519	2,132	1,613	1,613	0	382.0	862.5
Drum Division	4	2	174	172	172	0	20.0	7.3

* 90 MW available if Humboldt Bay Units 1 and 2 are backed down.

** Includes 44 MW of import from the Caribou 60 kV area.

*** B - A'

**** List as of February 8, 1985

[7] 2. Transmission Upgrades

Malinowski testified that two groups of transmission upgrades to its bulk transmission system have been identified. The first group will provide transmission carrying capability for an additional 1,150 MW of QFs, the QFs interconnecting under the terms of the interim solution. (See D.84-11-123 modifying D.84-08-037.) These bulk upgrades, their estimated cost, and expected operating dates are as follows:

Potential Bulk Transmission Upgrades
For First 1,150 MW of Added QF Power

	Estimated Cost (in Million of 1984 Dollars)	Expected Operating Date
String a second 230 kV circuit from Gold Hill to Tesla.	3.4	March 1988
Add about 500 MVARS of shunt capacitors.	8.0	June 1989
Build an additional 230 kV DCTL from Bellota to Tesla.	18.2	December 1989
Rebuild the Vaca-Dixon-Contra Costa 230 kV DCTL.	37.2	December 1990
Rebuild the Vaca-Dixon-Moraga 230 kV DCTL.	55.4	June 1991
Add second 500/230 kV transformer bank at Tesla.	15.5	June 1992
Total	137.7	

The second group of bulk upgrades will accommodate the transmission requirements of an additional 2,000 MW of QF power in the northern area. Approximately 2,000 MW of QFs are on a PG&E waiting list for transmission capacity in the northern area. These upgrades and their estimated cost are as follows:

Potentail Bulk Transmission Upgrades
For Another 2,000 MW of Northern QF

	Estimated Cost (in Millions of 1984 Dollars
Upgrade Round Mountain series capacitors.	$ 26.1
Build new Table Mountain - Tesla 500 kV line and install series capacitors and transformer banks at both ends.	154.8
Replace conductors of Weber -Tesla section of the Bellota-Tesla 230 kV DCTL with SSAC.	7.5
Add two circuits of two 3,500 kcmil cables at the underground section of Castel Rock Junction-Lakeville line.	5.4
Rebuild the Lakeville-Vaca-Dixon 230 kV DCTL with 2-1113 kcmil AAL conductors.	27.8
Total	$221.6

Finally, Malinowski described planned area transmission upgrades as follows:

Area Reinforcements

Area	Transmission Capacity (MW) Available	To Be Added	Estimated OD	Cost $ x 1000	$/Kilowatt (kW)**
Pit 1	5	100	1988	9,000	90
Cedar Creek	10	38	1987	4,400	116
Battle Creek	0	25	1987	2,000	80
Caribou 60 kV & Feather River	40	100	1990	13,500	135
Paradise	15	50	1987	3,000	60
Colgate	0	30	1988	2,500	83
North Bay North	0	80	1988	5,500	69
North Bay South	-	-	-	-	-

* In 1985 dollars.

** $/kW of area transmission capacity added - excludes $119/kW of bulk transmission costs.

[9] U.S. Windpower, Inc. (USW) in its brief stated that PG&E has provided incomplete information on transmission constraints in the Altamont Pass area. Malinowski during cross-examination testified that there are transmission constraints in this area. He further stated that there is a waiting list of at least 700 MW of QFs desiring transmission capacity in this area.[1] USW observes that PG&E has not provided examples of planned upgrades which will relieve these constraints in Altamont Pass.

B. Edison's Transmission System

Edison does not expect to have any transmission limitations during the ten-year period ending in 1994 that will constrain QF

---

1 By letter dated July 3, 1985, counsel for PG&E informed the administrative law judge (ALJ) that certain transmission lines in the Altamont Pass area have been "uprated" to accommodate most of the QFs on the waiting list.

development. E. M. Helm, Senior Planning Engineer, testified that the company's Fall 1984 Generation Resource Plan has 3,250 MW of renewable and alternate resources for the period 1985-1994. Helm stated that Edison has planned to develop its transmission system to accommodate these QF facilities. Accordingly, Edison does not expect any major difficulty in integrating QFs into its resources.

C. SDG&E's Transmission System

SDG&E also does not anticipate any bulk transmission constraints in its service territory which will limit QF development over the next ten years. Ronald Erdman Busher, Supervisor of Transmission Planning, identified two areas which have potential limitations: Boulevard and Warner Springs. However, Busher further testified that the actual QF development in these two areas will not surpass the line capacity in these areas. Thus, SDG&E believes there also are no significant area transmission limitations in its system.

[10] IV. Transmission Cost Allocation

After studying the utilities' evaluations of their transmission systems, the parties examined transmission cost allocation approaches. The staff held a workshop to see if the parties could agree upon a basic allocation of most transmission upgrade costs to utilities and their ratepayers. General agreement was reached; however, minor differences arose during the hearings.

The staff, through its witness Julian Ajello, stated that utilities have the responsibility for anticipating the growth of QF resources. Utilities also must plan and construct adequate transmission capacity. Ajello emphasized that QFs are a significant portion of utility resource plans and therefore must be considered in utility transmission plans. Ajello further stated that the cost of transmission capacity which

has multiple purposes is a legitimate ratepayer expense. Thus, staff believes the cost of transmission lines or upgrades should be allocated to ratepayers unless the transmission facility does not serve multiple purposes.

PG&E believes that the reasonable cost of nondedicated facilities necessary to take QF power should be paid by ratepayers. However, PG&E's witness Malinowski asked the Commission for guidance on the reasonableness of a transmission facility cost. Malinowski suggested that a cost cap of about $150/kW could be used as a guideline for determining reasonable area transmission costs. Malinowski explained that the company really was seeking Commission approval of the concept of a cap as a guideline and not for the fixing of a particular cap.

Edison urges the Commission to approve the company's current allocation under which

the QF pays for transmission facilities which are directly related to or required by QFs. If an upgrade is not directly required by or solely beneficial to a QF, the QF has no cost responsibility. In other words, as Edison's witness [11] Helm stated, if a transmission facility has system benefits, then the QF need not pay for it.

SDG&E asserts that its analysis of a transmission facility's cost is the same for QFs, all other resources, and customers. SDG&E analyzes the following factors for each transmission line:

1. Future system growth needs
2. System security and reliability
3. Emergency support
4. Economy energy access
5. Transmission losses
6. Transfer capacility
7. Firm resources at system peak conditions
8. Cost effectiveness

SDG&E believes that each transmission line or upgrade must be evaluated under the above criteria. SDG&E submits there is no need for the Commission to change the company's existing transmission planning method.

IEP asserts that it is the utility's obligation to plan and to build transmission upgrades or lines when there are benefits to ratepayers. IEP submits that as a general rule most transmission upgrades or lines will have system benefits and therefore should be paid for by the utility's ratepayers.

IEP asks the Commission to adopt a cost cap to provide some certainty about QF access to transmission. IEP proposes that any transmission project undertaken at an estimated expense below the cost cap would be presumed reasonable. In this way, IEP asserts a QF will have an indication of what transmission lines should be built by the utility to accept QF power.

IEP's witness Jan Hamrin testified that a cap of about $180/kW is appropriate for all utilities' area transmisison lines. Hamrin agreed with PG&E's witness Malinowski that all bulk [12] transmission lines have generalized system benefits. Accordingly, a cost cap for bulk transmission lines is unnecessary since the ratepayers always are responsible for these lines.

Ultrasystems submits that a cost cap for transmission projects should not be adopted. Ultrasystems states that the adoption of a cost cap would assume a long-run avoided cost for the utility which has not yet been determined. Ultrasystems argues that until the long-run avoided cost methodology is determined, a transmission cost cap cannot be adopted.

Pacific Lighting Energy Systems (PLES) agrees that QFs should not be responsible for transmission facilities which have system-wide benefits to customers. PLES points out that

this general concept is expressed in several ways by the different utilities. Accordingly, PLES recommends that the Commission adopt Edison's language as the standard for all utilities to avoid different applications by the utilities.

In addition, PLES submits that a cost cap, if adopted, should be used only as a general guideline in assessing the reasonableness of a transmission project. PLES emphasizes that a QF should have the right to come to the Commission if a utility refuses to build a transmission upgrade or line because its cost exceeds the cost cap.

V. Refund of Interim Solution 1.7 Mills/ Kilowatt-hour (KWh) Assessment

PG&E and staff recommend that since QFs should not be held responsible for the cost of most transmission upgrades, 1.2 mills/kWh should be refunded from any payments received under the terms of the interim solution. In addition, the 1.7 mills/kWh charge should be

reduced to .5 mill/kWh prospectively. The interim solution provided that 1.2 mills/kWh of the 1.7 mills/kWh is refundable if the Commission determines that QFs have no cost responsibility. However, [13] PG&E believes the interim solution is unclear as to what QFs should pay after the Commission's decision is issued. PG&E and staff assert that it is equitable for QFs to continue paying .5 mill/kWh over the life of the contracts since the QFs are receiving the benefits of transmission access before the transmission upgrades and lines necessary to accommodate their deliveries are completed.

The QFs maintain that no assessment is appropriate after the Commission issues a decision finding that QFs usually will have no cost responsibility. The QFs assert that the Commission cannot in "good conscience" assess a continuing charge of .5 mill/kWh, no matter how small, after it determines that QFs are not responsible for transmission upgrades or lines.

VI. Discussion

A. QFs generally are not responsible for the cost of transmission upgrades or lines.

QF deliveries are a significant part of each utility's resource plan. Accordingly, utilities must plan for and otherwise enable QF facilities to interconnect with their transmission systems in an expeditious manner. We recognize that both the diversity and the number of emerging QFs in PG&E's system have created new problems for the company's transmission planners. However, PG&E along with the other utilities must learn to facilitate the addition of QF power as it already has learned to accept power deliveries from all other resources.

The parties have agreed among themselves that QFs should not be responsible for the cost of transmission facilities which serve multiple purposes. The parties find since the ratepayers in the past have paid for

these transmission facilities, the ratepayers should continue to absorb the cost as long as the transmission facility has system-wide benefits. A QF is responsible only for interconnection and other facilities that have no system-wide [14] benefits and are solely beneficial to the QF. This approach eliminates the need for a difficult cost allocation among the various users of a transmission facility.

System-wide benefits can mean many things as shown in SDG&E's list of factors affecting its transmission planning. Thus, we believe that nearly all transmission facilities arguably may have some system-wide benefits. Bulk transmission lines by definition have system-wide benefits. And nearly all area lines probably will have some system-wide benefits. Thus, QFs will asssume cost responsibility only on the rare occasion that an area line lacks any perceptible system-wide benefit.

On occasion, a transmission facility's cost may outweigh its system-wide benefits. In this event, the QF perhaps should be responsible for any excessive cost caused by the interconnection of its facility to the utility's system. A rigorous cost-benefit analysis, however, touches upon many as yet undefined criteria. We have yet to determine a long-run avoided cost methodology for QFs. We have not yet adopted consistent energy reliability criteria for all utilities. The cost of transmission service is just one piece to the puzzle of properly valuing QF power. Thus, for the moment, we will allow utilities to follow the general principle that as long as a transmission facility has system-wide benefits, the utility's ratepayers are responsible for the prudent and reasonable cost. The QF is responsible only for interconnection cost and other special facilities which have no system-wide benefits. Refinement of this principle must await our determination in the long-run avoided cost proceedings.

B. A transmission cost cap can be a useful guideline for utilities and QFs.

PG&E has asked for Commission approval of the concept of a cost cap. PG&E's witness Malinowski carefully explained that a cost cap would help PG&E in its transmission planning for QFs as a [15] benchmark of costs that will be absorbed by ratepayers. However, Malinowski went on to say that PG&E would continue that same analysis in its transmission planning that would occur without the guideline of a cap. The concept of a cost cap is attractive but the calculation of the level of a cap involves many of the previously mentioned criteria which are not well-defined. To the extent a cost cap will be added to PG&E's existing analysis and will not become an accepted substitute for the usual study of a proposed transmission facility, it may refine and improve PG&E's current transmission planning process. Thus, we will permit PG&E to

develop a cost cap and use it as a tentative guideline in its planning.

We caution PG&E that its calculation of a cap may be examined by QFs and staff. The level of a cap may vary greatly depending on the selected assumptions. The information underlying the derivation of any cap should be shared with all interested parties. A QF may, by complaint to the Commission, allege that a selected cap is unreasonable and thereby bring the reasonableness of the utility's calculation into issue.

C. A .5 mill/kWh assessment should continue until the transmission upgrades associated with the interim solution are completed.

Under the terms of the interim solution, 1.2 mills/kWh of the 1.7 mills/kWh assessment is refundable if the Commission finds the QFs have no cost responsibility for transmission upgrades. Since we have

determined that QFs have virtually no responsibility for transmission facilities with system-wide benefits, 1.2 mills/kWh clearly should be refunded.

Since QFs participating in the interim solution will receive access to transmission before the associated upgrades are completed, we find it is reasonable to continue a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed. The payment is a minimal offset to [16] the potential diseconomies identified by PG&E. However, since PG&E has stated that the diseconomies will end once the upgrades are completed, there is no reason to continue the assessment beyond the completion date. Therefore, as each upgrade is completed, the QFs whose delivery was constrained by that line no longer should be liable for a .5 mill/kWh charge.

D. PG&E's Petition to Modify the Interim Solution to Exclude the Intertie should be granted.

The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling and grant PG&E's Petition to Modify D.84-08-037. We find after reviewing the evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution. We do not reach the larger question of whether and, if so, under what conditions QFs ever should have access to the Intertie.

Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the

maximum benefit of the ratepayers. Issues to be addressed in that proceeding will include, but will not be limited to:

1. the extent to which unlimited power purchases resulting from interconnection of out-of-state QFs would cause displacement of economy energy, especially from the Northwest;

2. the feasibility of developing pricing and curtailment options to protect ratepayers from paying uneconomic prices to out-of-state QFs should we determine that out-of-state QFs ought to be given an opportunity to serve the California power market;

3. a comparison of California and non-California avoided costs, to provide a perspective on the relative attractiveness of California as a market for out-of-state QF power; and

[16a] 4. an evaluation of the circumstances, if any, under which it would be appropriate to make standard offers available to out-of-state QFs and the form that such offers should take.

By examining the problems of how to deal with out-of-state QFs in a generic proceeding, we will avoid the risk of reaching a conclusion on these issues based on the necessarily incomplete record and limited perspective raised in the current proceeding in which the focus was exclusively on HydroPool's projects. The question of whether HydroPool should be granted access to the Intertie will appropriately become part of the more general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection.

Findings of Fact

1. PG&E expects to have significant constraints in its northern transmission

system during the next ten years which may affect QF development.

2. Edison and SDG&E do not expect to have any significant transmission constraints over the next ten years.

3. The parties agree that transmission facilities which have system-wide benefits should be paid for by ratepayers.

4. The parties agree that transmission facilities which lack system-wide benefits and are beneficial only to the QF should be paid for by the QF.

[17] 5. Bulk transmission lines have system-wide benefits and should be paid for by ratepayers.

6. Nearly all area transmission lines will have system-wide benefits and should be paid for by ratepayers.

7. A rigorous cost-benefit analysis of a transmission facility is dependent on criteria yet to be defined in other Commission proceedings.

8. QFs participating in the interim solution should be refunded 1.2 mills/kWh but should continue to pay a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed.

9. The Intertie is different from other constrained transmission lines in PG&E's northern system since (1) QF interconnection to the Intertie may cause greater displacement of economy power than QF interconnection to other lines, (2) QF interconnection to the Intertie will affect PG&E's negotiations of power purchase deliveries over the Intertie, and (3) PG&E has never represented to QFs that interconnection to the Intertie would be acceptable without price adjustments or curtailment provisions.

10. This investigation should be closed so that the parties may devote their attention and resources to the pending OIR 2 proceedings and the determination of long-run avoided cost for QFs.

Conclusions of Law

1. Ratepayers in the past have paid for transmission facilities which serve multiple purposes. Ratepayers should continue to pay for transmission facilities which have system-wide benefits.

2. QFs participating in the interim solution should continue to pay a .5 mill/kWh assessment until the transmission upgrades which are intended to eliminate operating diseconomies are completed.

3. A rational basis exists for excluding the Intertie from the terms of the interim solution.

[17a]

4. The Commission should establish a separate proceeding to investigate the unresolved questions relating to the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place. The issue of

whether HydroPool should be granted interconnection for its projects should be taken up in this new proceeding.

[18]

O R D E R

IT IS ORDERED that:

1. Utilities shall required QFs to pay only for transmission facilities which lack system-wide benefits and are beneficial only to QFs.

2. QFs participating in the interim solution shall be refunded 1.2 mills/kWh and shall continue to pay .5 mill/kWh until the transmission upgrades associated with the interim solution are completed.

3. Pacific Gas and Electric Company's Petition to Modify D.84-08-037 is granted to exclude the Intertie from the terms of the interim solution.

4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place.

5. I.84-04-077 is closed.

This order becomes effective 30 days from today. Dated September 18, 1985, at San Francisco, California.

DONALD VIAL
President

VICTOR CALVO
FREDERICK R. DUDA
Commissioners

I will file a written dissent.

/s/ WILLIAM T. BAGLEY
Commissioner

Commissioner Priscilla C. Grew, being necessarily absent, did not participate.

Excerpts from California PUC Decision
No. 82-01-03,
dated January 21, 1982

OIR 2 /ALJ/cm/km

O P I N I O N

[1a] Summary

This decision orders the major California electric utilities to file standard offers for power purchases based on avoided cost principles. These offers shall be available to all cogeneration and small power facilities that qualify under the Federal Public Utility Regulatory Policies Act of 1978. The decision finds that avoided cost pricing will promote the maximum efficient development of cogeneration and small power resources, diversifying the energy supply in California and reducing the state's oil dependence.

The standard offer gives qualifying facilities (QFs) a series of options to tailor contracts to meet their varied needs.

Within 45 days, the utilities are ordered to file the following standard offer options which will become effective upon a compliance review by the staff. These options are:

- Facilities providing as-available electricity (energy delivered without a long-term contract) will receive an as-available energy and an as-available capacity payment in ¢/kWh, varying by time of delivery. The as-available price will be based on a short-run avoided cost methodology, with capacity reflecting an estimate of the utilities' shortage cost (pp. 30-56).

- QFs which agree to certain performance standards may receive a firm capacity payment, rather than an as-available payment. The firm capacity payment is available in $/kW/year, and may be contracted for and levelized for up to 30 years. The firm capacity payment, like the as-available payment, is based on a shortage cost methodology. Firm capacity contracts will also include payments for energy (pp. 57-64).

[1b]

The decision orders utilities to file within 90 days proposals for three other option which will become available after additional hearings. These options are:

- Energy payments may be fixed in advance for up to five years for QFs which agree to commit to provide energy over the term of the contract. This energy payment may be tied either to an as-available or firm capacity option. Payments will be based on projected variable operating costs of the utilities (p. 51).

- A long term contract, based on a utility's long-run resource plan for both energy and capacity shall be available for QFs. This offer will be based on a long-run avoided cost concept (pp. 64-68).

The decision also establishes guidelines for the standard offer relating to interconnection costs, refusal to purchases, line losses and other contract terms.

The decision allows utilities to file for review of non-standard contracts with this Commission for two years after the effective date of this decision.

This decision also sets standards for rates for sale of power to QFs. Standby rates currently in effect are found reasonable for all QFs on demand schedules, and will be updated in general rate cases in proportion to increases in per kW capacity costs. They are eliminated for QFs who achieve an 85% on-peak capacity factor. Alternate standby rates are adopted for QFs on time-of-use rates. A time frame for planning periods of scheduled maintenance is adopted and scheduled maintenance rates are set at regular tariff

rates. Added demand charges are waived for maintenance fitting utility schedules. Interruptible service offerings are made available for all large QFs.

* * *

[23]

C. The Standard Offer

1. Introduction

We have previously referred to the "standard offer". This is the expression widely used by the parties to describe the terms and conditions associated with the utility's obligation to purchase from a QF at the utility's avoided cost. The standard offer is available to all QFs, and represents a complete transaction, including prices, interconnection requirements, and other relevant factors. A central aspect of all such offers will be the standard rates for purchase.

Section 292.304, paragraph (c), provides, in part:

> "(1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.
>
> "(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts."

[24]

Standard rates for purchases may differentiate between QFs using various technologies on the basis of their differing supply characteristics and must be consistent with the factors listed in Part IV, A, above. As discussed below, in this decision we provide for standard rates for QFs of 100 kW or less and for more than 100 kW. The rate has relevance only in relation to the mutual obligations of the parties. In this decision we consider the nature and extent of such obligations. The result is the standard offer.

The standard offer has particular significance in terms of the existing and anticipated ratemaking treatment to be afforded utility purchases of energy and

capacity provided by QFs. Purchases under the standard offer are per se reasonable and a utility's expenses for such purchases are recoverable in the same fashion as other purchased power expenses (in ECAC proceedings, for the larger utilities) without further review. Purchases at rates, terms, or conditions other than the standard offer are recoverable through ECAC or other appropriate procedures subject to a showing of reasonableness. Because of the different degrees of risk for the utility, there is widespread interest in whether the Commission will review nonstandard contracts prior to their becoming effective.

In adopting the parameters for rates that will be part of the standard offer, we are establishing a definition for a utility's avoided costs to be applied when purchasing energy from qualifying facilities under the terms and conditions of a specified standard

contract. To facilitate discussion of the specific issues related to avoided costs as raised in this proceeding, we will first make some general observations.

[25] The Commission has found in recent years that avoided cost (or marginal cost) pricing has significant benefits when applied to ratemaking. Avoided costs reflect the added costs to a utility of producing an additional unit of electricity. When marginal costs are used as the basis of rate design, consumers receive an efficient price signal. When adopted for purchasing electricity from third parties, the price encourages full economic development of those resources. Avoided cost pricing parallels the prices that would be established in a competitive market, providing many of the incentives for efficient resource allocation that a competitive market provides.

Some argue that ratepayers are disadvantaged when avoided costs are paid to qualifying facilities, because in some cases these facilities can produce electricity at less than the avoided cost price. While it may be true that some QFs could be brought on line at a purchase price below avoided cost, such a price would not be sufficient to bring in other QFs capable of producing power at prices up to the avoided cost price. The point of permitting avoided cost pricing is to encourage the fullest possible efficient development of QF resources that can effectively and economically compete with utility resources. By opening this market, the supply of electricity in increased, which should lower customers' rates over time. Heavy utility reliance on oil and gas fuels to generate electricity has caused rates in California to skyrocket. Avoided cost pricing is intended to stimulate development of

substantial generating capacity that will reduce utility oil and gas consumption. In addition, system reliability is increased by the presence of larger numbers of smaller facilities.

If anything, this Commisison believes that the avoided cost signal to QFs is a conservative one, as it does not include the tangible but hard to quantify "social costs" that are associated with new utility supplies and which are avoided through the purchase of QF power. These "social costs" include the risks associated with imported energy supplies and environmental degradation related to conventional generation. While several parties suggested that we explicitly include "social costs" in the avoided cost calculation, we are not including such factors at this time.

[26] We prefer to recogniz social costs in the general policy judgment that QF

production is competitive at avoided costs. This conclusion is reflected in the terms adopted in this decision that are intended to promote QF development.

We concur with FERC rules which require full avoided cost pricing of power from qualifying facilities. The issue we face now is how to arrive at avoided cost, not whether it should be paid. This proceeding has demonstrated that defining and calculating avoided cost is far from a trivial exercise, involving conceptual, empirical, and technical issues. Some of the issues cannot be resolved without further hearings. However, we resolve most of the major conceptual questions in this decision, and this will simplify the hearings that follow.

Before discussing each of the standard offers in detail, we will discuss the relationship between the offers and the method for using avoided cost principles to derive each of the offers ordered herein.

The first type of offer described below is a standard offer for "as-available" QF power, the price which the FERC indicates should be based upon the "purchasing utilities' avoided costs calculated at the time of delivery." The value of a unit of QF power delivered at any given point in time is equivalent to the cost that the utility would have to incur to produce an equivalent amount of power at that time. This is the short run marginal cost of electricity production in the utility system. As this Commission discussed at length in a recent PG&E rate case, (D.93887, December 30, 1981), the short run marginal cost of utility electricity production is the highest variable operating cost per unit of electricity produced at a given time plus a shortage cost which reflects the effects of the added increment of production [27] on reserve margins and reliability. As these costs are avoided

through purchases of QF power, the purchase price paid to QFs under the first offer is tied to the short-run marginal cost. This will include an "energy payment" equivalent to the utility's marginal operating cost and a "capacity payment" equivalent to the utility's marginal shortage cost. The purchase price, following the avoided short run marginal cost, varies by time of day and time of year.

The FERC rules also call for offers that are made "pursuant to a legally enforceable obligation ... over a specified term ... (with) the avoided costs calculated at the time the obligation is incurred." This type of offer thus takes the form of a long-term standard offer which must be based on projections of avoided costs. Such long term offers give greater certainty to both the QF and to the utility and its ratepayers. Following the same economic principles described above, we order long-term standard

offers which are based on projections of the utility's short-run marginal costs. Such offers reflect the expected short-run marginal cost that the utility will avoid through purchases from QFs at each point in time over several time periods. The price includes an energy component which is tied to short run marginal operating costs in each period and a capacity component which is tied to short run marginal shortage costs in each time period. Energy payments are allowed for up to five years, firm capacity payments for up to thirty years. A levelized payment option is ordered for capacity payments.

A final long-term avoided cost offer described below is based on projected long-run marginal costs rather than short-run marginal costs. These offers should be roughly equivalent over time, since the utility's

short run marginal cost can be expected over time to fluctuate around the utility's long-run marginal cost. The latter [28] is defined as the capital and operating costs of marginal additions to the utility's generation capacity. The avoided cost price offer that is based on the long-run marginal cost will be a more stable pricing alternative and will place system capacity additions derived from QF investments on an equal footing with those derived from utility investments. This long-term resource plan-based price offer for firm energy and capacity will be for periods up to thirty years, with energy and capacity payments tied to the utility's long-run marginal energy and capacity costs.

We note in passing that while long-run standard offers can be based on either projected short-run marginal costs or

projected long-run marginal costs, there is debate on the development of the long-run marginal cost. We will reserve for further review the proper relationship of energy and capacity in the long-run standard offer.

* * *

[72] e. Refusal to Purchase

FERC regulation Section 292.304(f) provides, in part:

> "Periods during which purchases are not required.
>
> "(1) Any electric utility which gives notice [73] pursuant to paragraph (f) (2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

> "(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility."

FERC states that this provision does not override "contractual or other legally enforceable obligations" of the utility to purchase from a QF and that such nonpurchase periods may be taken into account in setting rates for purchases. There is widespread interest in the way this provision will be reflected in the standard offer.

Staff offers a series of recommendations. It proposes that utilities not be allowed to refuse to purchase energy or capacity which is fixed by contract over a duration of obligation, except for conditions of emergency, maintenance, or minimum load. As an alternative, staff suggests utilities may offer the actual lower avoided costs to QFs if actual avoided costs are lower than those sufficient for as-available deliveries. Under the alternative the utility must accept all deliveries tendered by the QF and offer the actual lower avoided cost. Utilities [74] will be limited to 600 hours per year of paying a price lower than the published avoided cost price or refusing deliveries under conditions of maintenance or minimum load. Utilities that choose to pay lower prices would be required to pay prices higher than the published avoided cost price when actual avoided costs are higher than the published price for up to, but no more than, 600 hours per year.

APPENDIX C, ORIG. PGS. 73, 74

Staff further recommends that utilities propose a notification procedure that will provide adequate notice to QFs of times of nonpurchase and prevailing prices. A list of periods of anticipated nonpurchase is suggested so that QFs would be able to schedule maintenance to coincide with such periods. A minimum of 48 hours notice is proposed for QFs with baseload or intermediate-type plants. A minimum of two hours notice is suggested for QFs with peaking-type plants.

Nonpurchases are proposed to occur in the following order of priority: first, small power producers who can inventory fuel; second, topping cycle cogenerators who can bypass the electric generation and save some fuel; third, bottoming cycle cogenerators and small power producers where fuel cannot be stored.

Staff further proposes that each utility be required to present a report in every ECAC proceeding explaining and supporting periods when prices are lower than published or when nonpurchase occurs.

PG&E proposes:

> "Utilities shall not be required to accept power from QFs during (1) emergencies; (2) times of pre-announced maintenance on the utility system which are limited to the [75] shortest possible duration; and (3) operating conditions of minimum load on utility plants, the continued operation of which is necessary to serve anticipated daily load swings. Such minimum operating conditions include operation of geothermal facilities, utility dispatched hydro-electric facilities and firm purchases to obtain optimum use of these resources.
>
> "To account for the availability of economy energy, which is energy purchased by the utility at a price below the Standard Offer published prices, utilities may either:

"a. Calculate their avoided energy cost to include an annually expected number of hours of economy energy. During periods when economy energy is available, the utility shall not refuse to accept QF energy deliveries based upon price; or

"b. Offer the lower avoided cost price to QFs when economy energy is available and only curtail, and not pay for, energy and As-Delivered Capacity (if the QF has chosen that option for capacity payment) made available by a QF which refuses to accept the lower price."

[76] It would limit the number of hours of nonpurchase or lower prices to 600 per year.

PG&E also agrees that a report should be filed in ECAC proceedings (though not as detailed as proposed by staff) and with staff's recommendations regarding notice to QFs and priority of refusal to purchase.

Edison states that it is concerned with the possible impact of paying published avoided costs of QFs when lower cost

energy is available. It indicates that during such periods, the lower cost energy may be substantially below the cost of energy produced from the low sulfur fuel oil. It warns that a utility would be severely criticized if it were unable to meet its public utility obligation to its customers to provide lowest cost power, and an unjustified burden would be placed on the utility shareholder if the avoided cost payments were not recoverable in an ECAC proceeding. It concludes that payment at prices below published avoided cost, when its true avoided cost is less than the published price, is consistent with PURPA and FERC regulations.

SDG&E contends that "if the energy payment tables are properly calculated, the actual avoided costs to the QFs will be properly reflected and paid." It suggests that the problem of nonpurchase of economic reasons can be resolved through proper costing

periods. By adopting a "super off-peak" reflecting anticipated periods of low cost energy, the times when avoided cost energy rates would be so far out of line with actual avoided costs to justify refusal of deliveries would be minimized.

SDG&E does support the ability to pay at less than published costs for certain maximum hours during the year, and accepts 600 hours as reasonable.

[77] SDG&E states that staff's recommended notice requirement is "excessive". It offers two-hour notice for baseload and 30-minute notice for peaking units as "more realistic." It also objects to staff's nonpurchase priority. It argues that "curtailments must be based only on size, from largest to smallest. In an operational emergency, it is impossible to spend time deciding who has fuel capabilities and who does not."

In general, we find that the utilities have interpreted this provision more liberally than apparently intended by FERC. The language of the regulation expressly limits its application to periods when the choice is between a QF and self-generation. There is no recognition of economy energy purchases.

This interpretation is supported by FERC comments:

> "This section was intended to deal with a certain condition which can occur during light loading periods. If a utility operating only base load units during these periods were forced to cut back output from the units in order to accommodate purchases from qualifying facilities, these base load units might not be able to increase their output level rapidly when system demand later increased. As a result, the utility would be required to utilize less efficient, higher costs units with faster start-up to meet the demand that would have been supplied by the less expensive base load unit had it been permitted to operate at a constant output."

This concern does not appear to contemplate economy energy purchases.

[78] This issue must be addressed in the context of the standard offer options described above. The QF may contract to be paid on the basis of "the avoided cost calculated at the time of delivery." The right to not purchase arises only when that cost is less than zero, a negative avoided cost.

The QF may instead contract to be paid based on "the avoided costs calculated at the time the obligation is inccurred." This method yields the sort of "published prices" apparently referred to in the various comments. There is no basis for refusing to purchase from such QFs merely because actual avoided costs occasionally go below published prices. There is just as much of a chance that actual avoided costs will be occasionally

higher than published prices. Allowing for nonpurchase in the first instance without providing for a higher payment when appropriate is unfair. Providing for both higher and lower payments is inconsistent with the purpose of the option to be paid based on avoided costs calculated at the time the obligation is incurred. Therefore this QF should be refused electric purchases only when the avoided cost is negative.

QFs have expressed concern that there may be no maximum number of hours during which refusal to purchase energy may occur. They feel this may result in financing problems (among other problems) since the utilities then are viewed as having an open ended opportunity to refuse purchases. A refusal to purchase would, of course, be subject to Commission review as provided by FERC. A more pragmatic method is required to allay these concerns. First, this decision

will order that refusal to purchase, except in cases of emergency and scheduled maintenance, shall be limited to QFs of 1 MW or larger. Second, a refusal to purchase should only occur when a negative avoided cost occurs. Refusal to purchase should only apply in certain narrowly defined circumstances, unlikely to occur more than 100 hours per year.

* * *

[107]

V. Wheeling

FERC regulation Section 292.306(d) provides for limited wheeling:

> "If a qualifying facility agrees, and electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy

> or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e) (4) and shall not include any charges for transmission."

[108] In its comments FERC indicates that there are several circumstances in which a QF might prefer that an electric utility with which the purchasing utility is interconnected would make such a purchase - for example, if the avoided costs of the second utility are higher. However, if the first utility does not agree to transmit the purchased energy or capacity, it is not forced to wheel and retains the purchase obligations.

Staff states that the extent of state authority to order wheeling is limited by

federal law by virtue of the preemption doctrine. It points to PU Code Sections 2801-2816 as providing this Commission with limited jurisdiction to order interconnection for the purpose of transmitting energy on behalf of a "private energy producer," assuming that certain specified findings are made. Staff argues that these sections avoid federal preemption because jurisdiction is limited to transmission for the private energy producer's own use and because the transmission is limited to the service area of a single utility. Staff concludes that, although the Commission has no authority to require wheeling when federal jurisdiction attaches, utilities should be urged to consider wheeling requests on a case-by-case basis.

The utility response is varied. PG&E states that staff's position agrees with its view. Edison argues that even transmission on

behalf of a private energy producer is subject to exclusive federal jurisdiction through application of the commingling doctrine. SDG&E focuses on conditions that it proposes to require in the event that QF generation is made available by a wheeling utility.

CEC contends that this Commission should state clearly that utilities are encouraged to wheel. It states that this Commission can and should use our authority to ensure that [109] utilities do not use their monopoly control over transmission lines to hinder QF production. It offers the following statement for our endorsement:

> "The Commission will not tolerate the utilities' use of their control over the transmission system to limit access by small power producers who seek to use the transmission lines to transmit power to a purchaser of the small power producer's energy. Such actions will be considered by the Commission in setting rates for utilities in future ratemaking proceedings, and in evaluating the utilities' imagination and vigor in implementing and pursuing conservation and the development of small power production and renewables."

CEC suggests each utility report regarding requests for transmission service as part of its rate case showing.

Union states that wheeling can be a major factor in promoting cogeneration and small power production. It urges this Commission to strongly encourage utilities to consider all requests to transmit power and to accommodate such requests on a fair and nondiscriminatory basis. It warns that otherwise even such large companies as Union may be discouraged from pursuing opportunities.

NRDC argues that staff's conclusion regarding the extent of our jurisdiction is based on an unnecessarily narrow view of wheeling issues. It recommends that we consider fashioning "narrowly tailored wheeling requirements to further the objectives of PURPA."

CMA addresses specifically the issue of wheeling between two facilities of the same industrial entity. It argues that the principle of simultaneous purchase and sale fundamentally changes the concept of wheeling. It contends that the principle applies whether the resources and load are on the same site or separate sites. CMA observes that the utilities readily accept the same site principle, but reject its extension to separate sites.

[110]

We agree that wheeling is an important concept that can make a material contribution to cogeneration and small power production in California. For that reason we state plainly that each utility's willingness to wheel will be examined in the context of its overall conservation activities in conjunction with general rate case proceedings.

Regardless of utility's willingness to wheel power for its neighbor, each utility, for some reason, appears to limit its cogeneration and small power activities to the confines of its own service territory. This occurs even though locally available generation may not match requirements. Further, some generating sites, while located in other service territories, may still be closer to the buying utility's load center than would alternatives such as out-of-state power purchases. We find that it is not prudent for a utility to fail to pursue an otherwise beneficial facility simply because it is located in another service territory. In addition, this Commission will view with disfavor any actions or inactions by a utility which will interfere with the signing of a contract between a neighboring utility and a cogenerator or small power producer located in its service territory.

In the discussion above we considered whether to limit utility recovery in cases of utility participation in successful cogeneration and small power production ventures. We indicated that such participation should be favored. In relation to wheeling this principle applies to the prospect that a major facility may require utility financing or guarantees in order to be built (a classic "nonstandard" contract) that the "host" utility is unwilling or unable to provide (for example, the utility may already have excess capacity). In this case another utility may be able to participate under terms and conditions that benefit all parties.

The attractive feature of wheeling is that it introduces actual competition into the market. To the extent that competition occurs, the burden of regulation is proportionately reduced.

[111]

Respondent utilities are required to buy energy and capacity from a QF located in the service area of another utility whenever the conditions of Subsection 292.303(d) of the FERC rules are met.

Subsection 292.303(d) is clear that the price paid to the QF by the purchasing utility shall not include any charge for transmission but may be either raised or lowered to reflect the savings or costs resulting from line losses. The discussion accompanying the final FERC rules indicates that the serving utility would collect any applicable transmission charges for wheeling power from the QF and that, in the case of respondent utilities, the rates for these charges would be set under Part II of the Federal Power Act. Transmission charges by the serving utility should take into consideration the extent to

which the QF's power displaces power that would otherwise be transmitted from the utility which receives the QF's power to the serving utility. For example, if all of the QF's power displaces power that would otherwise be delivered by the purchasing utility to the serving utility, the transaction becomes a bookkeeping rather than a physical exchange, and therefore no transmission charges would appear to be justified.
[112]

At this stage of this proceding we are optimistic that the respondent utilities subject to this Commission's jurisdiction will respond to wheeling requests in a fair and nondiscriminatory manner. If our optimism is well-founded, we will need not decide the extent of action needed to encourage wheeling. If our optimism is unfounded, we will take what ever action is appropriate.

In this posture we must necessarily require information to be provided periodically regarding utility actions in this regard. Therefore, we will require each utility to report at the end of January of each year on wheeling performed during the previous year, the parties for whom the wheeling was performed, the terms and conditions applied to the transaction, the technical wheeling arrangements, the status of any pending requests to wheel, and the circumstances relating to any request that was refused.

* * *

[138]

The tariffs which the utilities shall file will be subject to preliminary review by our staff, and accepted for filing on an interim basis. Unique situations should be handled by a deviation procedure under General Order 96-A. We make these tariffs interim in

recognition that interconnection requirements are still evolving. We make no final judgment at this time regarding specific technical requirements necessary to assure operating reliability. We recognize that wide differences of opinion exist as to particular requirements which may need to be the subject of a general order. Accordingly, after six months we shall review these tariffs to assess their effectiveness, and, at that time, shall determine whether more detailed requirements are appropriate.

VIII. Interconnection Costs

A. Introduction

FERC Regulation Section 292.306 provides that each QF shall be obligated to pay any interconnection costs which the State regulatory agency may assess against the QF on a nondiscriminatory basis with respect to other customers with similar load characteristics. The State regulatory agency

shall determine the manner for payment of interconnection costs, which may include reimbursement over a reasonable period of time.

FERC Regulation Section 292.101(b)(7) defines "interconnection costs": [139]

> "'Interconnection costs'; means the reasonable costs of connection, switching, metering, transmission, distribution, safety provisions and administrative costs incurred by the electric utility directly related to the installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility, to the extent such costs are in excess of the corresponding costs which the electric utility would have incurred if it had not engaged in interconnected operations, but instead generated an equivalent amount of electric energy itself or purchased an

equivalent amount of electric energy or capacity from other sources. Interconnection costs do not include any costs included in the calculation of avoided costs."

There is an obvious relationship between certain of these costs and the standards of operating reliability discussed above.

B. Positions of the Parties

Staff states that in order to determine what are reasonable interconnection costs it is first necessary to determine what are the minimum acceptable interconnection standards.

Staff recommends that a procedure similar to the special facilities provisions of existing tariff schedules should be established for interconnection costs. Staff proposes that the QF have the option to either: (1) advance to the utility the estimated net installed cost of the

interconnection facilities and also pay the monthly cost of interconnection ownership charges as authorized in the utility's interconnection tariff, or (2) not elect to advance the estimated installed cost of the interconnection facilities and instead pay a monthly combined charge for added facilities as authorized in the interconnection tariff. Such a charge would cover both facilities and ownership costs. With the second option, the [140] customer agrees to pay the net unpaid balance, including interest, of the installed cost of the interconnection facilities, plus removal charges, less estimated salvage value. Staff proposes that CP National Corporation be excused from this approach on account of its status as a buyer of its entire requirements in California. Instead, CP National Corporation could include the method of payment either in its contracts with individual QFs or in separate facilities contracts.

APPENDIX C, ORIG. PGS. 139, 140

PG&E agrees with staff's recommendation, with certain modifications. PG&E suggests that when an agreement is terminated, the QF may be entitled to a refund of part of its advance payment to the utility. PG&E proposes that the QF may be required to make an additional payment to cover the cost of the equipment removal and outstanding installation expenses.

Edison states that although staff's list of protective functions is relatively complete, specific instances will require additional equipment, most likely in the cases of large generators. In such cases Edison contends that the need for the equipment will be apparent and the utility and QF will mutually agree that it is necessary. Edison suggests that the QF should pay for the equipment in such cases.

SDG&E states that the costs of interconnection as specified by the utility should be borne by the QF. If the Commission finds that SDG&E's interconnection guidelines are not reasonable, SDG&E is "willing to discuss revisions" to its interconnection guidelines.

SDG&E objects to staff's proposal that the QF have the option to obligate the utility to make a capital investment for interconnection costs. SDG&E states that to require the utility to add this funding burden to its other capital requirements negates one of the largest benefits of congeneration. SDG&E suggests that utility funding be at the option of the utility.

[141]

C. Discussion

The basic proposition is straightforward. Each QF is responsible for the cost of interconnection which exceeds the

cost the utility otherwise would incur to connect the QF as a customer. The costs of interconnection borne by the QF shall be only those costs necessary to meet the minimum reliability standards discussed above. The cost of additional requirements imposed by the utility shall be borne by the utility.

We are satisfied that staff has provided a sound payment basis, as modified by PG&E. SDG&E's concern regarding the possible financial burden of utility financing can be taken into account in calculating avoided costs, if an evidentiary basis can be shown.

Some QFs, particularly smaller ones, may require distribution-type line extensions. Wherever such line extensions are comparable to those serving residential or commercial customers, the charges to the QF should also be comparable to those charged

other utility customers, including refunds to customers. Distribution-type line extensions costs presently are covered in utility Tariff Rules Nos. 15, 15.1 and 15.2. Unless the QF's load characteristics on any line extensions required for the QF are different than for regular utility customers, the line extension costs should be the same for each to avoid discriminatory pricing practices.

* * *

Excerpts from California PUC Decision
No. 82-12-120,
dated December 30, 1982

O P I N I O N

Summary

Decision (D.) 82-01-103, January 21, 1982, established guidelines for utility purchases of electricity from cogenerators and small power producers. That decision ordered utilities to file five standard price offers each of which would be a complete contract which small power producers could sign without negotiation. The five offers were to meet the varied needs of different qualifying cogeneration and small power production facilities (QFs).

* The as-available offer pays an energy payment and a capacity payment in ¢/kWh varying by time of delivery. The payment is derived from utilities' short-run avoided costs (i.e., variable oprating costs plus shortage value). This offer is similar to a spot market purchase in a competitive environment and requires no long-term contract-type commitment on the part of the QF.

* The firm capacity offer is like the as-available except that payments for capacity are based on specific performance

requirements being met by the QF (including availability or output requirements). The capacity price may be fixed for up to 30 years. The offer provides some pricing certainty for those who can meet the specific performance criteria.

* The less than 100 kW offer is similar to the as-available, except for simplified requirements for the small facilities.

* The five-year forecast offer fixes energy prices for five years, providing more price certainty.

* The long-term resource plan based offer bases prices on new utility resources (as opposed to short-run avoided costs). It may be used to establish price more firmly for longer periods and to pay for the full value of new resources.

* * *

[113] The record indicates that at this time adjustments for line losses for remote sites is beyond our current capacilities. We will therefore suspend the use of specific line losses for remote sites until the problem is better understood. As part of the studies required of utilities, we will ask for an analysis of how to identify remote QFs and how to reflect a different loss rate. Until such studies are performed, remote QFs will not have individual line losses adjustments.

PG&E suggests that individual line losses should be established. This approach would not comply with D.82-01-103. The individual determination of line losses would create great complexity and would very likely result in frequent disputes between the utility and QFs. Aggregate line loss determinations are appropriate at this time.

4. Transformer Losses

An issue was raised about whether transformer losses should be included in the avoided cost payment, and if so, how that loss should be determined. The staff suggests an appropriate solution: simply place the meter on the utility side of the transformer, thereby automatically accounting for the transformer losses in the meter reading. We will adopt this recommendation. If a QF desires to have a meter on its side of the transformer, it may negotiate a transformer loss rate with the utility.

D. Refusal to Purchase and the Hydro Spill Rate

One of the more complex issues relating to energy payments regards the periods in which a utility may refuse to purchase from QFs or offer lower prices to reflect current conditions in the utility system. As described earlier, price [114] is established for electricity purchases for a time period based on projected average marginal costs. The actual avoided costs incurred will vary throughout the period, varying around the average established.

There are certain conditions in which the actual avoided costs deviate so significantly from the average that special treatment may be warranted. In particular, D.82-01-103 found that when the utility actually incurs costs by purchasing energy from a QF (a "negative avoided cost" condition), the utility should have the right to curtail QFs. In D.82-04-71, the Commission

also concluded that when a utility must spill water over its own hydroelectric facilities in order to purchase from QFs, a lower price is appropriate. The decision did not, however, permit a lower price to be established during periods when economy energy is purchased or when avoided costs are positive. Anticipated economy purchases were to be averaged in the avoided cost applied for the entire time period.

* * *

Excerpts from California PUC Decision
No. 83-09-054,
dated September 7, 1983

A.82-04-44, et al. ALJ/rr/jn *

I N T E R I M O P I N I O N

These proceedings involve adopting standard offers based on long-run avoided costs for power purchase contracts between the three largest electric utilities and qualifying facilities (QF). The utilities are: Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas and Electric Company (SDG&E).

Before explaining the procedural history which has brought us to this point, we think it is constructive to explain briefly why we have pursued developing such standard offers in view of the standard offers in-place which pay QFs for their power based on actual short-run utility avoided costs.

I. Summary of Decision

This decision authorizes what is termed Standard Offer #4, which has different payment options for QFs, all of which are based on

forecasts of the utilities' resource mix and costs. The three payment options under Standard Offer #4 resulted from negotiations. A negotiating conference, which lasted five weeks, was held at our direction, with vigorous participation by utilities, QFs, and our staff. We have committed to hold evidentiary hearings, which almost all parties desire. However, there is substantial agreement among utilities, QFs, and our staff that until a more permanent solution is found for the complex task of fairly valuing and pricing QF power over the long-run, Standard Offer #4, with three payment options, should go into effect.

We undertook the negotiating conference in the hope of coming closer to an interim solution which, while not perfect from all perspectives, could be useful for QFs and utilities. While some may have hoped to accomplish more than the scope of the

consensus reached, or they would have preferred different results, we think the negotiating conference was extremely fruitful. [3] The negotiated standard offer and three payment options are approved, with some reasonable restrictions on their use set by us under our prerogative.

Standard Offer #4, at this juncture, is interim in the sense it may ultimately be replaced with a different costing methodology, contract terms, etc. However, until that happens, it may be fully relied on by utilities and QFs who find the options useful. Those who contract under interim Standard Offer #4 will not be subject to having terms or prices changed later, except as narrowly and specifically ordered by this decision. Any changes made to this standard offer in the future will only apply to those contracting after such changes. Potential QFs

who find they cannot use Standard Offer #4, as approved today, still have the option of pursuing a negotiated nonstandard contract with utilities.

II. Background

Utilities' short-run avoided costs have proven to be more volatile than many observers would have guessed. We have seen a drastic run-up in fuel oil and gas prices, followed by a moderate decline in oil prices. The QF industry contends that the price uncertainty posed under the existing as-available and firm capacity standard offers, both based on short-run avoided costs, makes it extremely difficult to arrange financing for potential QF projects. QFs tell us that those who hold the financing purse-strings, both lenders and equity investors, are reluctant to commit capital when a project's payment stream is so uncertain. Our Decision (D.) 82-01-103 in OIR 2, issued January 21, 1982, recognized the

need to pursue [4] developing standard offers based on long-run avoided utility costs (page 67, mimeo.). Oil and gas prices were steadily rising when that decision was issued, and although the three largest electric utilities were ordered to file applications with proposed standard offers based on long-run avoided costs, most of our attention and that of the QF industry was directed to perfecting standard offers based on short-run avoided costs. Many assumed oil prices would continue to rise; few seemed to believe they would start a decline. As oil prices started to decline the intensity of interest in standard offers which would produce prices based on long-run (and presumably less volatile) avoided costs correspondingly increased.

If we do not adopt a standard offer based on long-run avoided costs as an alternative to the existing standard offers, the pressure for nonstandard contracts between utilities and

QFs could steadily increase. Such nonstandard contract negotiations pose problems for all: QFs typically ask for variations of up-front price security or certainty so they can finance projects, and utilities are faced with ensuring the nonstandard contract has suitable terms to make it a secure venture for them and their ratepayers; further, operating under our regulation, utilities are concerned about ultimate cost recovery, and worry that the prudence of nonstandard contracts may be successfully challenged in their energy cost recovery proceedings. Also, the long-term value of new QF capacity in the utilities' resource plans is not fully reflected by the existing standard offers which base prices on fluctuating short-run avoided utility cost (see D.82-01-103, p. 67). It is, then, in everyone's interest that a standard offer based on long-run avoided cost be adopted.

* * *

[21]

V. The Structure of Standard Offer #4 and Future Contract Language Consistency

This opinion will address what is called Standard Offer #4, which contains several payment options. Standard Offer #1 was adopted by D.82-12-120, and is for as-available energy payments; #2 is for firm capacity, and #3 is for smaller QF projects (under 100 kW). The Standard Offer #4 contracts proposed by each of the three utilities has some common contract terms that apply for all options, and specific terms covering the individual payment options. The filed contracts are complete with the agreed upon forecasts, upon which prices will be paid.

Each utility chose its own format and contract language, with the goal, however, of all being consistent in substance (with the exception of certain agreed to utility specific terms, such as curtailment). As experience is gained with standard offers, and

QF power purchase contracts generally, uniform standard contract language should be used by all utilities, except for terms which must clearly be utility specific because of substantitive differences. The convenience of standard language will greatly aid those who must review standard offers. We are disappointed this could not have been done for Standard Offer #4 in the context of the negotiating conference, but it appears time did not permit it. Rather than to simply pick one of the utilities' contracts and order that language used by the others, we will direct the utilities to work together with our staff, in proposing one form of Standard Offer #4 with uniform language (except where terms must be utility specific). Six months will be allowed for this undertaking, and the product shall be presented during the subsequent hearings for review.

* * *

[36]

D. Curtailment Provisions (Under All Payment Options)

The negotiated curtailment provisions for Standard Offer #4 are utility specific, with PG&E's provisions consisting of the following 2 options:

a) Curtailment under "negative avoided cost" conditions and a lower "hydro spill rate" under hydro spill conditions with no hourly limit. This option refers directly to this Commission's definition of negative avoided costs and hydro spill conditions.

b) A limit of 1,000 hours of real time prices per year for negative avoided cost, hydro spill and non-oil/gas units at the margin. This second option requires some further explanation, as PG&E explains:

> "PGandE will not curtail the QF when these conditions occur, but will instead offer to continue purchases at a price equal to the current actual avoided energy cost. The QF can then make its own operating decisions; PGandE and ratepayers will be indifferent. PGandE will limit the 1,000 hours to

off-peak periods, and increase the price in the other off-peak hours to account for the fact that these low-cost periods are no longer being averaged in.

[37] "PGandE's unique system means it will have to have maximum operating flexibility in the coming years to efficiently utilize the available resources. The 1,000-hour option helps provide this necessary flexibility while remaining faithful to the avoided cost framework. SCE and SDGandE are not providing the opportunity for the QF to remain operational and receive actual avoided costs, but are instead offering annual hourly curtailment limits. PGandE does not believe such an approach is appropriate in its case, and would object to one being imposed". (PG&E's Amended Application, Exhibit A, pages 11-12).

SDG&E's negotiated standard offer includes provisions to curtail QF production for up to a total of 300 off-peak hours per year where such purchases result in "negative avoided cost" to SDG&E "as such term is defined by the CPUC (SDG&E's Amended Application, page 22)."

Edison's offer curtails the QFs production for up to 300 off-peak hours when:

> "(i) purchases would result in costs greater than those which Edison would incur if it did not purchase energy from seller but instead utilized an equivalent amount of energy generated from another Edison source (emphasis added), or
>
> "(ii) the Edison Electric System demand would require that Edison hydro-energy be spilled to reduce generation". (Edison's Amendment, page 26)[5]

In D.82-01-103, D.82-04-071, and D.82-12-120, we defined "negative avoided costs" as a situation where, due to operational circumstances, purchases from QFs would result in costs greater than [38] those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself. We cite

---

5 The phrase "generated from another Edison source" is interpreted (by both SCE and the Commission) to exclude economy energy purchases. Hence, it conforms with Commission policy on this issue.

such a condition as being when a baseload or large oil-fired intermediate load plant is shut down at night due to an excess of QF electricity but then cannot be restarted and brought up to its rated output for the next day's peak load, thus necessitating instead the start-up of a plant with very high generating costs (e.g., a gas turbine peaker) or an expensive emergency purchase of capacity. In D.82-04-071 the Commission concluded that, while curtailment was not appropriate for hydro spill conditions, a lower "hydro savings" price is appropriate. The decision did not, however, permit a lower price to be estalished during periods when economy energy is purchased or when avoided costs are positive. Anticipated economy purchases were to be averaged in the avoided cost applied for the entire time period. Proposals to restrict the number of hours that

curtailment and hydro spill conditions apply were denied in D.82-01-103 and D.82-04-071. However, in D.82-12-120 we directed utilities to undertake studies which would be considered in reviewing future proposals to establish such limits.

Only PG&E's curtailment option a) conforms with our narrowly defined negative avoided cost and hydro spill conditions established for Standard Offers contracts #1 and #2. We acknowledge the nonconformity of PG&E's option b) and the other utilities' curtailment provisions with our previous decisions. However, we consider these disparities as part of the negotiation process and integral to the parties arriving at a negotiated "package". We alert parties that these provisions will be reviewed and evaluated for prospective standard offers in evidentiary hearings.

E. The "Regulatory Authority" Clause

Edison and SDG&E have what are commonly termed "Regulatory Authority" clauses, which allow for changing contract terms if directed by a regulatory agency. Edison's reads as follows:

> "This Contract shall at all times be subject to such changes as any regulatory agency may direct in the exercise of its jurisdiction. If there is any conflict between the provisions of this Contract and any changes directed by such regulatory agency, the Parties shall amend this Contract in a manner consistent with such regulatory changes."

Both utilities indicated they include this clause consistent with prior Commission directives with respect to earlier standard offers. PG&E indicated it was willing to drop this clause because it seems incompatible with a long-term forecast based and binding contract, particularly if this Commission clearly intends to allow utility cost recovery for prices paid under standard offer contracts.

In view of our holding that contracts entered under Standard Offer #4 will not be subject to retroactive change based on prospective developments in the continuing saga of pricing QF power, we think the regulatory authority clause should be deleted. In other words, the quid pro quo for giving QFs certainty with respect to all contract terms, and eliminating the regulatory authority clause, is that QFs may not freely switch to other contracts later, until their contract term is up, if subsequent contracts or terms appear more favorable. Thus, we are really exchanging certainty of contract sanctity for certainty of commitment, and given our reaffirmation that cost recovery will be allowed utilities for all standard offer power purchase contracts, we think this only fair. QFs contend that with the regulatory authority clauses in the contracts

of Edison and SDG&E there will be insurmountable hesitation by lenders because of [40] uncertainty. In ordering the clauses removed we recognize that we cannot order retroactive changes to interim Standard Offer #4 contracts but, given the restrictions placed on the use and availability of this negotiated standard offer, we are willing to commit to that loss in flexibility.

* * *

Excerpts from California PUC Decision
No. 84-03-092,
dated March 21, 1984

A.82-03-26, et al. ALJ/rr

[58] b. Developments Since November 1983

Since our first review of PG&E's petition, we have been concerned that there have existed "special facts" to which only PG&E has had access.

In January of this year, we were informed by the staff of a briefing of the staff by PG&E in November, 1983. Details of this briefing accompanied a proposed Order Instituting Investigation (OII) into transmission constraints on QF development in PG&E's northern California service territory.

[59] According to the staff, PG&E at this briefing informed the staff that limitations on its transmission system were going to severely restrict QF development in the region. To accommodate a potential 800 MW of QF generation, PG&E represented to the staff that transmission system improvements

would be required in the estimated amounts of $130 million for bulk system upgrades and $100 million for local area improvements.

This information, of course, has not been verified nor included in any formal pleading or Commission proceeding. In PG&E's recent general rate case, the only acknowledgment of any constraint on its transmission system related to wind development in Solano County. In that case, staff had recommended a rate of return penalty for PG&E's refusal to reallocate 218 MW of capacity to other wind developers in the area if the two wind developers to which this capacity had been committed could not meet their contractual obligation to proceed by January 1984. We rejected staff's recommended reallocation on the grounds that our first come, first served approach in allocating transmission resources to QFs was not intended to favor one technology over another. We

further stated that "before committing transmission resources to QFs, we would want to ascertain whether Northwest Power would be displaced as a result." (D.83-12-068, p. 331.) As we discuss below, PG&E has now taken this statement out of the context of the limited record we had before us in the rate case, applied it to its alleged current transmission constraints, and concluded that it cannot commit any transmission capacity to northern California QFs at all until a further Committion order permitting it to do so.

[60] In addition to failing to alert the Commission of its transmission constraints in any proceeding or pleading, PG&E has also chosen its own method for dealing with a QF's cost liability for future system alterations, rather than the one approved by the Commission. As we stated earlier, guided by PG&E's testimony in this proceeding, we had felt it sufficient to require the utilities,

"prior to the standard offer being signed," to identify "any future system modifications planned or assumed by the utility, the particular changes likely to be charged to the QF, and the basis for these charges being imposed." (D.83-10-093, at p. 60; see also, Ordering Paragraph 13.) Obviously, under PG&E's current scenario, the costs to the QF for system upgrades could be staggering, and without any specification of that liability in the manner which we required, the effect on financing or development could be quite chilling.

PG&E, however, has addressed the question of future system upgrades by adding language to its standard offers which has never been presented to or approved by this Commission. In response to concerns expressed by the Commission President, the assigned Adminstrative Law Judge (ALJ) contacted PG&E for more information on this

development. On February 15, 1984, a PG&E attorney responded by letter. Among other things, the letter included the following representations:

1. "Transmission studies conducted by PGandE indicate the current and future existence of transmission capacity limitations in this region. Transmission limitations occur in both the bulk and area system."

2. The region where these limitations "have been identified" include "Humboldt, Shasta, De Sabla, Colage, Drum, Sacramento, and the northern part of Stockton Divisions."

[61] 3. Bulk transmission capacity limitations occur on PG&E's 230 and 500 kV transmission system, and area transmission limitations occur on PG&E's 230, 115, and 60 kV system. PG&E relates these limitations wholly in the case of area limitations and in part in the case of bulk transmission limitations to QF generation exceeding available transmission capacity.

4. PG&E cannot "unilaterally" commit transmission capacity to QFs or allocate costs to QFs without Commission approval or a Commission evaluation of its statement in D.82-12-068 that "before commiting transmission resources to QFs, [the Commission] would want to ascertain whether Northwest power would be displaced as a result."

According to the letter, PG&E decided, based on the above circumstances, that its best course of action was to develop "language for inclusion in its power purchase or other agreements with QFs in the affected regions." The language is not included in the power purchase agreement only if "the QF has been advised in a letter or through the interconnection study process."

Thus, while not able to "unilaterally" commit transmission capacity to QFs, PG&E has been capable of "unilaterally" adding the following language to its standard offers. PG&E claims the language is merely a formal reiteration of the QFs' existing

obligations under PURPA and Public Utilities (PU) Code § 2813. No mention is made, however, of our orders and decisions in this proceeding. The added provision states:

[62] "Due to the location and the point of interconnection of the Facility to PGandE's system and the limited availability of transmission capacity on PGandE's existing system, Seller may incur interconnection costs associated with providing reinforcements and/or additions to PGandE's transmission system to accommodate Seller's power deliveries. Notwithstanding the execution of this Agreement or any provision herein, Seller's right to be paid for and deliver power to PGandE shall be contingent upon Seller's payment of all interconnection costs allocable to Seller in accordance with the applicable PGandE tariff or appropriate CPUC order. PGandE shall determine as soon as it is practicable those reinforcements and/or additions to its transmission system necessary to accept power deliveries from Seller and the estimated costs associated therewith." (Emphasis original.)

APPENDIX F, ORIG. PGS. 61, 62

[63] According to PG&E's letter, this language has been added to 12 standard offer contracts all involving projects of 10MW or more, for a total of 248.6 to 255.6 MW. While the majority of these contracts have been identified as Standard Offer No. 4 constracts, we note that our orders involving future line and system upgrades adopted in this proceeding were made specifically applicable to Standard Offer No. 4 by Ordering Paragraph 1.f. of D.83-09-054. PG&E did not include in its letter the number of contracts to which this clause was not added due to a "letter of understanding."

PG&E appears to be challenging the entire foundation of our standard offer procedures. It seems unnecessary to repeat, but the very corner stone of these proceedings and OIR 2 is a standard offer whose terms are approved by this Commission and are available to any QF as approved. A negotiated offer

only results from the QF, not the utility, finding the standard offer unacceptable and wishing to alter its terms. This principle was clearly stated in D.82-01-103 and has never been changed: "The standard offer is a choice of contract terms at the QF's sole option." (Emphasis added; D.82-01-103, at p. 148.)

In keeping with the above finding, Ordering Paragraph 25 of D.82-01-103 directed that the "standard offer shall be available to all QFs for acceptance and shall be consistent with the terms and conditions provided for in this decision." The offer was to "remain in effect until further order of this Commission." By Ordering Paragraphs 2 and 11 of D.82-01-103, the utilities were to file by application Standard Offers Nos. 1, 2, and 3, for this Commission's review for their compliance with D.82-01-103. The only [64] terms to be included in a standard offer

therefore were to be those authorized by D.82-01-103, as modified by D.82-04-071, and "further order of this Commission." With respect to Standard Offers Nos. 1, 2, and 3, such further orders have included only D.82-12-120, D.83-10-093, and this decision.

Thus the purpose of our standard offer approach has not only been to fulfill legal obligations imposed by PURPA, but also to place the QF and the utility on an equal footing with respect to a QF's power sales. Information known only to the utility was not to be used to change the terms of a standard offer and the QF was to be certain of a market for its generation on terms reviewed and approved by this Commission.

While certain issues relating to the standard offers had yet to be covered by this order at the time PG&E was adding the above language, provisions governing interconnection standards and costs were not among them. Although PG&E refers in

its letter to PURPA and the code, our interpretation and application of those laws are contained, with respect to interconnection, in D.83-10-093, an order which is as binding on PG&E as those statutes. While PG&E's Tariff Rule 21 correctly refers to the QF's obligation to pay for system upgrades, that language and any related provision of PG&E's standard offers or special facilities agreements was to be subject to the following limitations of Ordering Paragraphs 12 and 13 of D.83-10-093:

[65] "12. The utilities' tariff rules and standard offer provisions governing interconnection costs and special facilities agreements shall require the following:

* * *

"f. The QF shall be responsible for the costs of only those future system alterations which are necessary to maintain this Commission's adopted interconnection standards for the QF's particular interconnection facilities. Should an upgrade not be directly required by or beneficial to the QF, the QF shall be treated like any other customer on the utility's system."

* * *

"13. Each utility shall provide to the QF, prior to the standard offer being signed, all relevant tariff rules governing interconnection costs as well as the identification of any future system modifications planned or assumed by the utility, the particular changes likely to be charged to QF, and the basis for these charges being imposed."

[66] References to neither these orders nor their requirements are contained in PG&E's above-quoted contract provision or its letter. Instead of following the guidelines of Ordering Paragraph 13, PG&E merely states that it will determine "as soon as practicable those reinforcements and/or additions to its transmission system, necessary to accept power deliveries from Seller and the estimated costs associated therewith." It does not appear that PG&E demonstrated, "prior to the standard offer being signed," what those charges were likely to be or the basis for imposing them on any QF.

In addition to unilaterally adding language to its standard offer in violation of D.82-01-103 and reciting requirements which do not follow the direction of our orders in D.83-10-093, PG&E has also based its added provision on a fact which has never been presented, adduced, or proved in

any Commission proceeding -- "the limited availability of transmission capacity on PGandE's existing system". To the contrary, in this proceeding, PG&E's witness testified that future construction on the utility's system could be identified 5 to 10 years in advance. While acknowledging that "unpredictable events" (Tr. 1395) might affect this estimate, the 5 to 10 year period was one with which the witness felt "comfortable." (Tr. 1360.)

While this matter has been submitted since November, 1982, the fact remains that the record was little more than one year old when PG&E first revealed its transmisison system problems to our staff. Despite Clerk's testimony and PG&E's acknowledgement that its current required construction could take five years to complete, PG&E maintains that it has been unable to identify what is required and what a QF's cost responsibility might be.

[67] The need for extensive changes in PG&E's transmission system and the commencement of QF development in northern California are also events which should hardly have been "unpredictable." The roots of this proceeding date back to December 10, 1979, when we first adopted avoided cost pricing in D.91109 for cogeneration facilities and urged the utilities to promote the development of alternate resources. We doubt, too, based on the record and PG&E's current statements, that, unless PG&E is seriously undermanaged or mismanaged, the current state of its transmission system was not known to PG&E at the time of hearings in this proceeding or, at least, at the time of its recent general rate case. Nevertheless, PG&E feels no compunction about using one of our statements based on the limited record in its general rate case as a basis for refusing to commit any transmission line capacity to QFs.

We must now consider the proper recourse against PG&E for its actions.[2] As stated previously, the staff has proposed an OII into the limitations, if any, of PG&E's existing transmission system.

An OII, however, would suggest that our problems with PG&E are merely of a technical, rather than a regulatory nature. Further, an OII would imply that the burden of demonstrating the existence of PG&E's alleged transmission limitations is on the Commission, rather than on PG&E who has apparently already manipulated its "special facts" to the detriment of QF development in northern California. Assuming that PG&E was not aware of its [68] transmission

---

2 We note also that these actions include PG&E's current interpretation of its provision governing power deliveries from the QF in the manner which differs from that ordered by the Commission in Ordering Paragraph 8(f) in D.83-10-093.

limitations during hearings in this proceeding or its general rate case, PG&E, of course, should have sought modification of its standard offers based on new facts either by a petition to reopen this record or a new application. Such steps would, of course, have properly placed the burden of proving these facts and the basis for any change in the standard offers or our policy on PG&E. In the case of an OII, PG&E, having already made the changes it desires in its standard offer, would no doubt be in no hurry to respond to data requests or develop its own testimony "without first hearing from staff." While we believe that there are important technical and policy issues to be addressed in an OII on the transmission operations of PG&E and other California utilities, it is inappropriate to issue one in response to the problem at hand.

Under these circumstances, a different course of action is appropriate at this time. PU Code § 2113 provides as follows:

> "Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any remedy prescribed in this part, but is cumulative and in addition thereto."

[69] Under the authority of this provision, we will issue an order for PG&E to show cause at a hearing date to be set by that order why PG&E should not be held in contempt for violation of Commission D.82-01-103 and D.83-10-093. The order to show cause will also consider PG&E's apparent violation of Rule 1 of the Commission's Rules of Practice and Procedure. That rule provides as follows:

> "Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he is

> authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

In the meantime, however, we will direct PG&E to follow the letter and spirit of our decisions. PG&E will be prohibited from adding the contract language quoted above to any standard offer or related "special facilities" agreement or refusing to sign any standard offer contract or related "special facilities" agreement in the absence of such language or a similar "letter of understanding." To the extent that such a provision has been included, in any signed standard offer, accompanying letter, or related "special facilities" agreement that term is to be considered null and void as of

the date [70] of the contract signing.[3] Similarly, PG&E will be prohibited from establishing a maximum rate of power delivery based on the QF's anticipated maximum rate of deliveries to PG&E. A provision in a signed standard offer based on this improper standard is also considered null and void as of the date of contract signing. PG&E will be directed to replace the incorrect figure with one based on Ordering Paragraph 8.f. of D.83-10-093.

In addition, PG&E will be directed to comply specifically with Ordering Paragraphs 8.f., 12.e., and 13 of D.83-10-093

---

3 We note that, depending upon the circumstances, a QF signing a standard offer with PG&E may have its interconnection cost responsibilities enumerated in a separate special facilities agreement as specified in PG&E's tariffs. No matter what the form, this Commission's authority, as recognized in Ordering Paragraph 12 of D.83-10-093, extends to any agreement designed to set forth the standard offer and tariff provisions approved by this Commission. Our orders, therefore, are equally binding on the terms used in such agreement.

in signing standard offers and supplying information to QFs. It is clear from PG&E's letter of February 15, 1984, that the utility to some extent has studied the future system alterations that may be the responsibility of those QFs in whose standard offers PG&E placed the above-quoted provision or who were similarly advised "in a letter or through the interconnection study process." PG&E shall provide these QFs with the information required by Ordering Paragraph 13 to the full extent of its availability. PG&E shall also inform these QFs of all relevant studies underway or planned and shall provide these studies as they become available. We wish to ensure that these QFs obtained all of the information to which they were entitled prior to the standard offer being signed.

We note that we can now better understand the reason for IEP's request that QFs not be held liable for any costs

associated [71] with a utility bulk transmission line upgrade. While IEP's position was not in keeping with the record in this case, the circumstances which have recently come to light with respect to PG&E's transmission system suggest that we reconsider our rules governing interconnection and interconnection costs.

* * *

[81] Findings of Fact

1. This order is the third decision in A.82-03-26, A.82-03-37, and A.82-03-78. The order is necessary to consider those issues not addressed in D.82-12-120 and D.83-10-093 and the merits of petitions for modification of those two decisions.

* * *

[88] 46. PG&E has failed to comply with Ordering Paragraphs 12.e. and 13 and related discussion in D.83-10-093 and Ordering Paragraphs 2 and 25, Finding 26, and related

discussion in D.83-01-103 by failing to follow the procedures and the standard offer language specified in those orders and by adding the following language to its standard offers:

> "Due to the location and the point of interconnection of the Facility to PGandE's system and the limited availability of transmission capacity on PGandE's existing system, Seller may incur interconnection costs associated with providing reinforcements and/or additions to PGandE's transmission system to accommodate Seller's power deliveries. Notwithstanding the execution of this Agreement or any provision herein, Seller's right to be paid for and deliver power to PGandE shall be [89] contingent upon Seller's payment of all interconnection costs allocable to Seller in accordance with the applicable PGandE tariff or appropriate CPUC order. PGandE shall determine as soon as it is practicable those reinforcements and/or additions to its transmission system necessary to accept power deliveries from Seller and the estimated costs associated therewith." (Emphasis original.)

47. The language quoted in Finding 46 above was never made part of PG&E's standard offers submitted in this application filed in response to Ordering Paragraphs 2 and 11 of D.82-01-103 nor has the provision been submitted as part of a new application or other formal pleading requesting amendment of PG&E's standard offers. The Commission therefore has never reviewed or approved the quoted language.

48. "The limited availability of transmission capacity on PGandE's existing system" is a fact which has never been presented, adduced, or proved in any Commission proceeding and which conflicts with the record in this case.

49. The development of QFs in northern California and the current state of PG&E's transmission system should not have been "unpredictable" events.

50. The statement in D.82-12-068 that "before committing transmission resources to QFs, [the Commission] would want to ascertain whether Northwest power would be displaced as a result" must be read within the context of the actual record on which it was based. This statement was not intended to serve as the basis for PG&E's refusal to commit any transmission line capacity to QFs.

[90] 51. An OII is an improper response to violations of our orders in this proceeding and OIR 2.

52. Under the authority of PU Code § 2113, it is appropriate to issue an order for PG&E to show cause why PG&E should not be held in contempt for violation of Commission D.82-01-103 and D.83-10-093 as described in this decision and the preceding findings. The order to show cause should also consider whether PG&E should be held in contempt for violation of Rule 1 of the Commission's Rule of Practice and Procedure.

* * *

[99] 19. An order to show cause why PG&E should not be held in contempt as provided under PU Code § 2113 shall issue for PG&E's failure to comply with Commission ordering paragraphs, findings, and related discussions in D.82-01-103 and D.83-10-093 and Rule 1 of the Commission's Rules of Practice and Procedure as described in this decision. The ordering paragraphs include Ordering Paragraphs 2, 11, and 25 of D.82-01-103 and Ordering Paragraphs 8.f., 12.e., and 13 of [100] D.83-10-093. At the hearing, PG&E shall also be required to demonstrate (1) whether and the extent to which utility customers comparable to QFs have ever been required to pay for PG&E bulk and area transmission system improvements in the past, (2) the specific instances when this situation has occurred, and (3) the cost allocation which has been employed.

* * *

APPENDIX F, ORIG. PGS. 99, 100

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-686

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDICES TO JURISDICTIONAL STATEMENT

VOLUME II (of 3 Volumes)
Appendix G through K

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDICES TO JURISDICTIONAL STATEMENT

VOLUME II (of 3 Volumes)
Appendix G through K

Original page numbers appear at bottom of pages and in [ ] throughout the text.

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

Excerpts from California PUC Decision
No. 84-08-031,
dated August 1, 1984.

A.82-03-26, et al ALJ/vdl *
[33]

Finally, PG&E asserts that the intent of its petition for modification of D.83-10-093 was to address problems related to existing line capacity and not future area transmission or bulk system upgrades. Although PG&E knew of the constraint problem when the petition was filed, the "transmission constraint situation had no relevance or bearing on the issues contained in the Petition, . . ." (Brief, at p. 17.)

* * *

[42]

All of these facts lead us to the following conclusions. First, the added contract clause did not embody a QF's "existing obligations." If the language was not intended to impose on the QF the cost responsibilities described in Ordering Paragraphs 12.e. or 13, there was no other applicable Commission rule which would have

required a QF to pay for bulk transmission upgrades. At most, Ordering Paragraph 12.a. imposes cost responsibilities on QFs for area upgrades only. The fact that this circumstance was known to PG&E is reflected in the testimony of its witnesses and its decision in its brief not to reassert the applicability of Ordering Paragraph 12.a. or cite the Commission to any other rule embodying the QF's "existing obligations."

By this order, the Commission will make clear that, accepting PG&E's position with respect to Ordering Paragraphs 12.e. and 13, there currently is no requirement for QFs to pay for bulk transmission line upgrades. We will also specifically limit the application of Ordering Paragraphs 12.e. and 13 of D.83-10-093 in the manner described by PG&E. A QF will thus be required to pay only for [43] changes to its own facilities or interconnection facilities to provide safety

conformance with the system modification undertaken independently by the utility after the QF's initial interconnection. As stated to be PG&E's policy, the QF, other than as described above, will not be responsible for the costs of capacity upgrades unless required to accommodate an increase in QF peak capacity. The information to be provided to the QF under Ordering Paragraph 13 shall be limited to the extent of the utility's knowledge prior to the completion of an interconnection study. Our modification of these orders, which will impact other utilities as well, is appropriate since these orders were based on PG&E's recommendations which have been clarified in this proceeding.

With respect to imposing in this order any responsibility for QFs to pay for bulk system upgrades, we feel at this time that such an action would be inappropriate.

> to curtailment [44] rules, pending a final Commission determination in this investigation. (Order I.84-04-077, pp. 2-3.)

Our clarification of Ordering Paragraphs 12.a., 12.e., and 13 in this decision serves to remove the uncertainty regarding the QF's current cost responsibility for bulk transmission line upgrades. In evaluating the proposals for interim solutions solicited in the OII, we will take into consideration our findings and conclusions in this case.

With respect to a final solution adopted in the OII, we wish to emphasize PG&E's current approach to customers comparable to QFs. Because of first year revenues, these customers have in fact never been required to pay for upgrades necessary to provide them with utility service. Even if these revenues had been insufficient, however, the customer would at most have been responsible for area transmission and distribution modifications.

As Clerk testified, any bulk upgrades have been the responsibility of ratepayers as a whole. The fact that PG&E has yet to determine whether or not a similar policy relating to bulk upgrades should be extended to QFs, appears to reflect the utility's understanding that such a policy had yet to be established by the Commission. In any event, it appears that the customer's production of revenues in no way influences their responsibility for bulk system upgrades - it just does not exist regardless of their revenues. Under our current policies a similar rule applies to QFs. We leave final resolution of this issue, however, to the OII.

The added contract language also stated as fact a circumstance which, as we stated in D.84-03-092, has yet to be proved or adduced in any Commission proceeding - "the limited availability of transmission capacity on PGandE's existing system." While the OII

[45] is now the proper forum to adduce the existence or extent of these transmission limitations as they impact QF development, the record in the order to show cause is the basis for our judging whether this statement was substantially correct when it was added to QF contracts. Although Coulter testified that available transmission capacity is always limited, the specific problems affecting QFs were so ill-defined that Meyer, PG&E's chief QF negotiator, refused to even provide QFs the "rough cost estimate" relating to the transmission limitations. Meyer also was unable to identify the modifications for which the QFs would be responsible other than that they would include bulk and area system improvements. These statements as well as other testimony indicate that PG&E's understanding of the scope of its constraints was extremely limited at the time the clause at issue was added to QF contracts.

PG&E has also emphasized that it had informed the Commission staff of its transmission limitations in November 1983 and was advised by the staff that the best response to this problem would be an OII. We have no doubt that the staff, based on the [46] information before it, acted most reasonably. As stated before, the OII has now been issued. PG&E's actions in informing the staff, however, hardly appear to be those of a utility aggressively promoting alternate generation. According to Coulter, the staff could not have determined that a problem existed or the extent of that problem without information from PG&E. Although PG&E stated that it was awaiting direction from the Commission on how to handle the transmission constraint problem, none of its witnesses felt that the Commission could provide that direction without additional information.

Nevertheless, PG&E apparently felt that its only obligation was to impart its initial undocumented findings to the staff, leaving it then to the staff and the Commission to request any additional data needed to provide solutions to the problem. We state the obvious - this data could come from only one source: PG&E, on whose system the limitations exist. At the time of the hearings on the order to show cause, however, PG&E had neither undertaken nor completed any studies beyond its September study defining the problem or seeking solutions. We also question PG&E's commitment to QF's based on its approach to QF transmission planning. While stating the difficulties of transmission planning for QFs, Coulter acknowledged that the study which PG&E completed in September 1983 could have been performed at any time prior to that date. Yet

no such study had been undertaken, no list of QFs like that prepared for the study had ever been requested by the transmission planners, and with two exceptions, no PG&E long-term transmission plan prior to that filed in May 1984 had reflected QF needs.

Coulter explained that only the significant upgrade of the Northwest intertie required such an examination. If, however, as Coulter stated, transmission capacity is always limited, we see no reason for only this latent inclusion of QFs in PG&E's transmission planning. Further, with respect to the 3,200 MW upgrade, we note [47] that PG&E knew of this situation in October 1982, when it commenced its study of the feasibility of accepting that power. Simultaneously with that study, PG&E, of course, could easily have commenced the type of study for QFs which was not initiated until August 1983, but only took little more than one month to complete.

We also note that while PG&E placed great importance on its informing the staff of its transmission limitations, it never informed the staff of its decision to add language to any of its purchase power agreements. Even when a member of the staff suggested a warning, no effort was made to contact that staff member to indicate language relating to the transmission limitations had already been added to PG&E's purchase power agreement. PG&E asserts in its brief that the staff's suggestion regarding the warning points out the logic of PG&E's decision to add the clause.

Regarding PG&E's legal actions, we turn now to the subject of PG&E's petition for modification of D.83-10-093. Given PG&E's interpretation of its request for modification of Ordering Paragraph 8.f., it appears that the Commission did misinterpret PG&E's

actions. PG&E's approach to the maximum rate of power deliveries in contravention to Ordering Paragraph 8.f. predated the issuance of that order.

We also now understand the reasons for an approach different from Ordering Paragraph 8.f. Namely, if a contract is signed prior to an interconnection study being completed, it is impossible to complete that contract provision. We believe that the preferable approach, and the one which we will adopt in this proceeding, is to leave the clause blank with a footnote that the [48] correct number will be entered upon completion of the QF's interconnection study.

The petition, however, still creates problems for us. In its brief, PG&E states that the "transmission constraint situation had no relevance or bearing on the issues contained in the Petition, . . ." (Brief, at p. 17.) Yet, the arguments upon which PG&E

supported its requested modifications of Ordering Paragraph 8.f. and the "first come, first served" procedure appear to reflect the exact opposite. Specifically, PG&E based the need for these modifications on, among other things, the following two statements: (1) "The availability of existing utility line capacity is limited"; and (2) "Since the hearings, PG&E has been confronted with various situations where more than one QF desired to interconnect with its system and existing line capacity would not accommodate all of the proposed projects." These statements appear to be nothing more than another way of saying that PG&E was experiencing "transmission limitations." Further, such limitations would have had a significant impact on a procedure designed to allocate the remaining line capacity. Obviously, an explanation of PG&E's transmission constraint problem, as known to

PG&E's attorney at the time the petition was filed, would certainly have enhanced the Commission's understanding and response to the request. It may have even provided some of the guidance of which PG&E stated it was and is still in need.

We are also concerned about some of the decisions which it appears PG&E's legal department made in choosing the issues to be raised before the Commission in the petition. During the hearings, Clerk testified that PG&E could not in fact comply with Ordering Paragraph 13, the order which governs the information to be supplied by the utility to the QF relating to "future system modifications." Clerk and his attorney discussed certain limited circumstances under which Clerk thought PG&E might be able to comply with Ordering [49] Paragraph 13. However, not only was this position not in keeping with that taken by PG&E in the

compliance hearings, but it was also acknowledged by Clerk that, in his opinion, the ordering paragraph actually required more than such limited compliance.

Despite Clerk's testimony that he had "discussed the difficulty in complying to Order Paragraph 13 with representatives of our legal department," a request to amend the order accordingly is conspicuously absent from PG&E's petition for modification. Again, an understanding of PG&E's limited ability to comply with Ordering Paragraph 13 would have greatly assisted the Commission in its effort to draft rules responsive to the needs of both QFs and the utilities.

We cannot conclude definitively that the actions taken by PG&E in its general rate case or this proceeding in response to its transmission limitations demonstrate an intent to mislead the Commission in contravention of Rule 1 of our Rules of Practice and

Procedure. They do, however, reflect a utility which does not approach QF development with any sense of urgency. PG&E must appreciate our need for information which only PG&E can provide in order for the Commission to properly evaluate particular situations and adopt appropriate rules. Control over this information lies predominately with PG&E. To the extent that this information is either withheld, intentionally or unintentionally, or processed slowly, our rules cannot be kept responsive to QF and utility needs. The end result in this case, of course, is that QF development is not furthered, but hindered.

We note also that while the disputed language was added only to nonstandard contracts, PG&E was actively dispensing warnings about its transmission limitations in all of its negotiations involving QFs larger than 100 kW who were without interconnection studies or would not become immediately

operational. In fact, the contract language was initially drafted for the larger QFs [50] irrespective if whether the agreements to be signed were standard offers or not. In all cases, PG&E's employees were urged to memorialize the understanding of PG&E's transmission limitations and a QF's cost responsibility for the needed improvements.

All of these circumstances point to a need for this Commission to once again reiterate its rules governing standard offers and QF development and to modify certain rules to ensure that all parties to QF negotiations understand their requirements. Ordering Paragraph 12.a. will therefore be modified to reflect its application to area transmission and distribution lines only. Ordering Paragraphs 12.e and 13 will be modified to further define "future system modifications" and identify the information which can be provided to a QF signing a contract prior to

the completion of an interconnection study. Ordering Paragraph 8.f. will be modified to indicate the course of action which should be followed in the absence of an interconnection study.

We will take no futher action with respect to our "first come, first served" approach to existing line capacity since that issue has been raised by PG&E in I.84-04-077. Any changes to that procedure can be litigated in that forum during which all parties will have an opportunity to present evidence on the issue.

By this order, we will also provide further guidance on the subject of negotiated contracts. Our orders will be based on our prior discussion in this decision.

In closing, we conclude that we cannot find PG&E in contempt of our orders as described in D.84-03-092 or D.84-03-093. We find that we have insufficient proof of intent to violate our orders.

We do, however, have a record which does not justify the assertion by PG&E of an aggressive commitment of QF development. In PG&E's last general rate case, we had two recommendations by the staff for rate of return penalties related to PG&E's actions in [51] signing and negotiating contracts with QFs. In one case, we rejected the recommendation on the basis of an absence of "demonstrable evidence." In the other case, we found staff's position not entirely in keeping with our policy against favoring one QF technology over another. This record, however, coupled with these recommendations seriously undermines our confidence that PG&E in fact is promoting QF development and that it is not following a course of "systematic bad faith negotiations."

We are therefore faced with the need of ensuring the most careful scrutiny of PG&E's actions. We find that in the near future we will have three opportunities for such

scrutiny - A.82-04-44, PG&E's long-term standard offer application, with hearings commencing in that and related applications on July 23, 1984; I.84-04-077, the investigation into PG&E's transmission limitations; and ultimately, PG&E's next general rate case. We will take these opportunities to thoroughly examine PG&E's QF programs. We note further that the next recommendation of rate of return penalty by the staff or any other party related to PG&E's handling of QF development will be given our highest priority and closest scrutiny.

Findings of Fact

* * *

[56] 35. The testimony in the order to show cause hearings demonstrates that PG&E's understanding of the scope of its transmission constraints was extremely limited at the time the clause at issue was added to QF contracts.

36. PG&E's actions in informing the staff of its transmission limitations do not appear to be those of a utility aggressively promoting alternate generation. Neither the Commission nor the staff could have understood the extent or complexities of PG&E's transmission limitations without information being provided by PG&E.

[57] 37. PG&E's commitment to QFs is also made questionable by its approach to QF transmission planning. Prior to September 1983, despite PG&E's apparent ability to include QFs in transmission planning and studies, no study had been undertaken, and no list of QFs like that used for the September 1983 study had ever been requested by PG&E transmission planners. With two exceptions, no PG&E long-term transmission plan prior to that filed in May 1984 had reflected QF needs.

38. If transmission capacity is always limited, no reason exists for the latent inclusion of QFs in PG&E's transmission planning as described in Finding 37. A study of QF needs could have been included in PG&E's study of the feasibility of a 3,200 MW upgrade of the Northwest intertie. This study was commenced in October 1982.

39. The staff was never informed by PG&E of its decision to add the subject clause to its power purchase agreements or the language of that clause.

* * *

[58] 44. There is no conclusive evidence that PG&E intended in its general rate case or this proceeding to mislead the Commission regarding its transmisison limitations.

45. PG&E's actions reflect a utility which does not approach QF development with any sense of urgency and is not aggressively committed to that development.

* * *

[59] 50. Insufficient evidence exists of an intent by PG&E to violate this Commission's orders as described in D.84-03-092 and D.84-03-093.

51. Sufficient evidence does exist, however to require careful scrutiny of PG&E's actions and programs impacting QF development in future Commission proceedings. Three of these proceedings are A.82-04-44, I.84-04-077, and PG&E's next general rate increase application.

* * *

ALJ/md

Decision 84-08-037 August 1, 1984

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	)	I.84-04-077 (Filed April 18, 1984)

(Appearances are listed in Appendix A.)

I N T E R I M O P I N I O N

Summary

We essentially approve an interim solution proposed by the Commission staff, Pacific Gas and Electric (PG&E), and various small power producers for the alleged transmission constraints in the Northern Portion of PG&E's transmission system. An interim solution is needed to allow small power production and cogeneration to proceed in PG&E's northern transmission system while this proceeding is pending.

Procedural Background

On April 18, 1984, the Commission issued Order Instituting Investigation (I.) 84-04-077 and began its investigation of the electric utilities' transmission systems to determine whether transmission limitations may exist which will constrain the development of cogeneration and small power production (QFs). PG&E, Southern California Edison (SCE), San Diego Gas and Electric (SDG&E), Pacific Power and Light (PP&L), and Sierra Pacific Power (Sierra Pacific) companies were named as respondents to I.84-04-077 and were required to file statements assessing the likelihood and the extent of transmission system limitations which may emerge over the next 10 years due to QF development. Each Utility duly filed a statement for its service territory.

[2] PG&E stated that it currently expects the capacity of parts of its northern bulk and area transmission systems to be exceeded at times during the next 10 years due to QF development.

SCE stated that it anticipates no limitations on its bulk or subtransmission system over the 10-year period 1984-1993 which will constrain QF development.

SDG&E stated that it forsees possible limitations in two of its area sub-transmission systems over the next 10 years due to QF development.

PP&L stated that it anticipates no limitations on its existing and planned bulk and area transmission system due to QF development in California. Sierra Pacific also stated that it does not anticipate any transmission limitations over the next 10 years due to QF development.

From the utilities' filed statements, it appears that a significant constraint on QF development may exist in PG&E's northern transmission system. Both PG&E and various small power producers have informed the Commission staff that limitations on PG&E's northern transmission system do exist which will restrict QF development.

The Commission staff realized that if limitations do exist in PG&E's northern transmission system, then some QF development could be slowed and even stopped while I.84-04-077 was pending. Accordingly, the Commission staff held a series of publicly noticed workshops attended by the utilities and interested QFs. The purpose of the workshops was to examine the expected limitations in the utilities' transmission systems and to devise an interim solution for any limitations. At these workshops, PG&E presented a number of interim solutions which

would accommodate QF development in its northern transmission system while I.84-04-077 was pending. Starting with PG&E's presentation, the participants to these workshops then [3] began negotiating an acceptable interim solution for the limitations in PG&E's northern transmission system. The Commission staff, PG&E, and designated QF representatives were the key negotiators.

The first Prehearing Conference (PHC) for I.84-04-077 was held on June 22, 1984. At this PHC, the Commission staff, PG&E, and the designated QF representatives announced that a stipulation had been reached on an interim solution for PG&E's northern transmission system. The Administrative Law Judge (ALJ) ruled that the stipulation should be served upon all parties to I.84-04-077 by July 3, 1984. The stipulation was mailed to

the parties on July 5, 1984. The ALJ further ruled that written comments on the stipulation would be considered. These comments were to be served on the parties by July 13, 1984.

A second PHC was held on July 17, 1984. At this second PHC, the stipulation and the written comments were reviewed. The parties also were permitted to make oral statements on the stipulation and to respond to the written comments.

We now will turn to the stipulation and the comments received on the stipulation.

The Stipulation

The stipulation has been signed by PG&E, the Commission staff, and Independent Energy Producers (IEP). Several QF representatives participated in the negotiations although only IEP is a signatory to the stipulation. The stipulation has been entered in the formal file for I.84-04-077. [4] The essential terms of the stipulation are as follows:

1. The stipulation applies only to QFs located in the Northern Portion of PG&E's service area who sign a power purchase agreement with PG&E during the interim period.

2. The stipulation will be in effect until the Commission issues a final decision for I.84-04-077.

3. Affected QFs will be assessed 1.7 mills/kWh for power received by PG&E, payable only on kWh generated at operating levels up to a 60% capacity factor (monthly basis). Of this amount, .5 mills/kWh is nonrefundable. All or some of the remaining 1.2 mills/kWh will be refunded if the Commission determines in its final decision for I.84-04-077 that QFs' cost responsibility for transmission upgrades is less than 1.7 mills/kWh. The affected QFs cost responsibility will not exceed 1.7 mills/kWh for the entire life of their projects.

4. PG&E shall institute all necessary operational changes to accommodate QF power. Such changes may include noneconomic dispatch of its resources.

5. The maximum MW of QF power that may be interconnected under the terms of the stipulation is limited in each northern area as follows:

Shasta Cedar Creek	31 MW
Shasta Battle Creek	54 "
De Sabla Caribous and De Sabla Feather River	140 "

De Sabla Paradise	65 MW
Colgate	30 "
North Bay Northern*	100 "
North Bay Southern	480 "
Humboldt	90 "
TOTAL	990 MW

* Depending on location, 30 MW can be added prior to completion of upgrades.

[5]

6. Available transmission capacity shall be allocated on a first come, first served basis, as defined in D.83-10-093, Ordering Paragraph 12(c).

7. PG&E shall proceed with all necessary area transmission upgrades and shall file an application for the required bulk transmission upgrades.

The purpose of the stipulation is twofold. First, the stipulation gives QFs certainty about their cost responsibility for transmission upgrades while I.84-04-077 is pending. QFs requiring capacity in PG&E's northern transmission system will know that their cost responsibility cannot exceed 1.7 mills/kWh for the life of their projects. Second, PG&E agrees to make the operational

changes necessary to accept QF power. Without such changes, QF deliveries would be curtailed when other resource availability exceeds transmission capacity in PG&E's northern transmission system.

Comments on the Stipulation

The following parties submitted written comments on the stipulation: California Energy Company (Cal Energy), Northwest Power Company (Northwest), Trans-Pacific Geothermal (Trans-Pacific), Cogeneration Services, Inc. (Cogen), Aeolus Wind Farms (Aeolus), MCR Goethermal Corporation (MCR), City of Santa Clara (Santa Clara), Pacific Lighting Energy Systems (Pacific Lighting), SCE, SDG&E, GeoProducts Corporation (Geoproducts), and Nevada Geothermal Transmission Study Group (Nevada Group). PG&E also submitted a list of corrections and minor modifications to the stipulation. All of these comments have been entered in the formal file.

The comments submitted by PG&E and Northwest were accepted by the signatories to the stipulation. Accordingly, they are incorporated into the stipulation without further discussion.

Cogen and GeoProducts ask that the stipulation be modified to include all QFs located within and outside PG&E's service territory that are affected by transmission constraints in PG&E's Northern transmission system. Independent Power Corporation (Ind Power) made an oral statement at the second PHC requesting the [6] same modification. The Commission staff and PG&E orally opposed this modification and urged the Commission to restrict the stipulated interim solution to those QFs located within PG&E's northern service territory.

Cal Energy, Trans-Pacific, and Nevada Group, each filed written comments requesting that the stipulated interim solution be expanded to include SCE. Each of these goethermal energy developers assert there are transmission limitations in SCE's Eastern Division which could constrain geothermal energy development.

Aeolus filed a written comment stating that SDG&E has had transmission limitations which affected wind farm developers in SDG&E's service area.

SCE and SDG&E filed similar comments stating that the stipulation applies only to PG&E and does not bind other utilities.

Finally, Santa Clara, MCR, Pacific Lighting, and SDG&E, in their comments supported the stipulation and suggested clarifying language. The Commission staff and PG&E did not accept the suggested clarifications.

Discussion

At the outset, we must commend the Commission staff for its initiative in organizing the workshops and for its perseverance in negotiating the stipulation with PG&E and the QFs. The Commission staff through it efforts has demonstrated that it will carefully [7] balance the competing interests of QFs, utilities, and ratepayers in this proceeding.

The success of the stipulation is evident. Very few written comments protesting the stipulation were received even though it was served on all appearances to I.84-04-077, A.82-03-26, and A.82-04-44. Of these protests, only one (Cogen, GeoProducts, Ind Power) would require a substantive change in the stipulation.

Cogen, GeoProducts, and Ind Power ask only that the stipulation be modified to include QFs who may not be located in PG&E's

service territory but nonetheless are affected by the capacity limitations in the northern transmission system. Such QFs are located in the service territories of utilities or municipal utility districts adjacent to PG&E's service territory. These QFs intend to wheel their power through the adjoining service territories to PG&E.

Cogen argued at the second PHC that it would be discriminatory if the Commission should adopt a stipulated interim solution which is available only to QFs located in PG&E's service territory. Cogen points out that the adopted interim solution will control QF development around PG&E's northern transmission system while I.84-04-077 is pending, and therefore is a very important factor in negotiations between QFs and PG&E. Cogen maintains that there is no legal basis for extending an interim solution to QFs located within PG&E's service territory and for excluding QFs outside the territory.

The Commission staff and PG&E responded that they were unwilling to extend the stipulated interim solution to QFs outside of PG&E's northern transmission system because this particular issue was not addressed in the negotiating sessions. Both the Commission staff and PG&E were concerned that unknown amounts of QF power could displace more economic power if the in-service area restriction is removed. PG&E emphasizes that no studies were made of the financial [8] impact of QF deliveries from outside the service territory. Therefore, the negotiators of the stipulation could not have considered the financial impact of these QF deliveries on PG&E's transmission system.

Cogen replied that QF development outside the service territory of PG&E is limited and should not result in the inundation of QF deliveries feared by the Commission staff and

PG&E. Moreover, Cogen stated it was willing to stipulate to a maximum delivery from QFs outside the service territory if this would alleviate the Commission staff's and PG&E's concerns.

We find that any interim solution should be afforded to all QFs affected by potential transmission constraints in PG&E's northern system. At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries. Both groups of QFs are willing to deliver power to PG&E's system under the same pricing formulas. Their similarity to the utility is confirmed by PG&E's distinction of its planning area from its service territory. Apparently, PG&E already has considered the impact of some QF's outside its service territory that are located in CP National's service territory and in municipal utility

districts. These QFs are within what PG&E calls its planning area, which extends beyond its service territory. Therefore, PG&E in its plans for QF deliveries has not distinguished between QFs located within and those located outside its service territory. We believe, as does PG&E in its planning, that there is no meaningful distinction between these QFs and will modify the stipulation as requested.

However, we also find merit in the concern expressed by the Commission staff and PG&E that unlimited amounts of QF deliveries from outside PG&E's service territory could displace large amounts of more economic power. PG&E's ratepayers could suffer large losses if such displacement is permitted. This problem can be solved by [9] specifying a maximum MW level of QF development that may be interconnected under the interim solution. In this way, the ratepayer's exposure can be limited to the consequences that the

negotiating parties were able to evaluate. We will choose as the maximum level the total of the area capacity limitations agreed to by the negotiating parties in the stipulation or 990 MW. With this ceiling, the total MW of QF development that may be interconnected pursuant to the interim solution cannot exceed 990 MW. Once this total level is reached, PG&E shall no longer be obligated to interconnect QFs under the terms of the stipulated interim solution. The MW levels for the individual northern areas specified in the stipulation are still applicable.

Subject to these two modifications, we approve of the stipulation negotiated by the Commission staff, PG&E, and QFs representatives and will adopt it as an interim solution.

Findings of Fact

1. PG&E expects to experience bulk transmission constraints in the Northern Portion of its service area.

2. PG&E expects to experience area transmission constraints in six operating divisions: Humboldt, Shasta, De Sabla, Colgate, North Bay and Drumm.

3. Because of these transmission constraints, PG&E at times may be physically unable to accommodate the delivery of some QF power in addition to the energy and capacity commitments PG&E already has made.

4. PG&E can accommodate this QF power on an interim basis by changing its operating practices.

5. QFs assert that uncertainty about their cost responsibility for transmission upgrades will hinder the development of QF power in Northern California; this uncertainty will persist while I.84-04-077 is pending unless the Commission adopts an interim solution.

[10] 6. The Commission staff, PG&E, and QF representatives have stipulated to a proposed interim solution which will remove some of the uncertainty about cost responsibility for transmission upgrades until I.84-04-077 is decided.

7. QFs inside PG&E's service territory and QFs outside of PG&E's service territory may be affected by transmission constraints in PG&E's northern system.

8. Any interim solution should be afforded to all QFs affected by transmission constraints in PG&E's northern system.

9. To protect PG&E's ratepayers from the displacement of more economic power, the maximum level of QF power that may be interconnected under the interim solution should be 990 MW.

Conclusions of Law

1. The stipulated interim solution and this interim order do not predetermine any of the issues to be addressed in I.84-04-077.

2. All parties to I.84-04-077 were given an adequate opportunity to review the stipulation, file written comments, and make oral statements at a public hearing.

I N T E R I M O R D E R

IT IS ORDERED that:

1. The interim solution proposed in the stipulation of the Commission Staff, PG&E, and QF representatives is modified as follows:

   a. The interim solution will be applicable to all QFs affected by transmission constraints in the Northern Portion of PG&E's service territory.

   b. No more than 990 MW of QF power may be interconnected by PG&E under the terms of the stipulated interim solution.

   c. The changes in the stipulation prepared by PG&E and Northwest are incorporated into the stipulation.

2. The modified interim solution is approved and shall remain in effect until further order of the Commission.

This order is effective 30 days from today. Dated August 1, 1984, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
DONALD VIAL
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate.

Commissioner William T. Bagle, being necessarily absent, did not participate.

List of Appearances

Respondents: Peter W. Hanschen, Michael S. Hindus, and Jo Ann Shaffer, Attorneys at Law, for Pacific Gas and Electric Company; Manning W. Puette, Attorney at Law, for San Diego Gas & Electric Company; Margaret A. Glodowski, Attorney at Law (Nevada), for Sierra Pacific Power Company; R. K. Durant, Carol B. Henningson, and Susan L. Steinhauser, Attorneys at Law, for Southern California Edison Company; and Wayne P. Sakarias, Attorney at Law, for San Diego Gas & Electric Company.

Interested Parties: Brian Sway, for Capitol Oil Corporation; Thomas R. Sparks, for Union Oil Company of California; Robert N. Kittle, Attorney at Law (Pennsylvania), for Navy Department; Steve Cohn, by David Mundstock, for California Energy Commission; Jane S. Kumin, Attorney at Law, for Natomas Company and Thermal Power Company; Linda Fain, for California Department of Water Resources; Harry K. Winters and John C. Catton, for University of California; John C. Lakeland, for himself; David L. Ludvigson, Attorney at Law, for California Energy Company, Inc.; James Kaiser, for Sierra Energy and Risk Assessment; Kelly Runyon, for City of San Francisco; Peter M. Strauss, for Fayette Manufacturing Corporation; Rufus S. Scott, Attorney at Law (Colorado and Texas), for Phillips Petroleum Company; Shirley S. Nowicki, for Sun Geothermal Company; Fred E. John and Thomas Clarke,

by Gay M. Phillips, for Southern California Gas Company; Douglas Porter, for Pacific Lighting Energy Systems; William B. Marcus, for California Hydro Systems, Inc.; Roy Alper, Attorney at Law, for Independent Power Corporation; Robert Tormey, for Pacific Hydro Company; R. Lee Roberts, Attorney at Law, for Hanna & Morton; Norman Ross Burgess, for himself; Jan Hamrin, for Independent Energy Producers; Michel Peter Florio and Jon F. Elliott, Attorneys at Law, and Sylvia M. Siegel, for Toward Utility Rate Normalization (TURN); Mark Lyons for Ultra Systems, Inc.; David Branchcomb, for Henwood Associates, Inc.; Karen Rohier, for Aeolus Wind Farms, Inc.; Jon Castor, for himself; Patrick Moast, for the California Department of Water Resources; Reed V. Schmidt, for himself; Messrs. Pettit & Martin [2] by Edward B. Lozowicki, Attorney at Law, for Cogeneration Services, Inc.; W. Randy Baldschun, for City of Palo Alto; Gary L. Fontana, Attorney at Law (Washington, D.C.), for Northwest Power Company; and Elizabeth Henderson and Laura King, for Natural Resources Defence Council.

Commission Staff: Diane Fellman, Attorney at Law, and Julian Ajello.

(END OF APPENDIX A)

Excerpts from California PUC Decision
85-01-039, dated
January 16, 1985

OPINION ON LIMITED REHEARING

Background

On November 21, 1984, the Commission granted a limited rehearing of Decision (D.) 84-08-037 on two issues: (1) whether the interim solution adopted in D.84-08-037 should apply to Qualifying Facilities (QFs) located outside of Pacific Gas and Electric Company's (PG&E's) service territory whose output would flow on the Pacific Northwest-Pacific Southwest 500 kV Intertie north of Round Mountain Substation (Intertie), and (2) whether access to PG&E's Drum Division transmission facilities should be reviewed and reallocated.

On December 7, 1984, a prehearing conference (PHC) was held to determine the positions of the parties interested in these two issues. PG&E, Independent Energy Producers Association (IEP), Public Staff

Division (staff), Cogeneration Services (Cogen), Southern California Edison Company (Edison), California Energy Company (CEC), and San Diego Gas & Electric Company (SDG&E) took positions on the Intertie issue. Mac Hydro Power Company, Inc. and Enviro Hydro, Inc. (Mac Hydro), Northwest Power Company (Northwest), PG&E, Auslam Associates (Auslam), and staff took positions on the Drum Division access issue.

[2] At the PHC, the Administrative Law Judge (ALJ) directed PG&E to present a witness on December 17, 1984 explaining why PG&E seeks to exclude the Intertie from the interim solution adopted in D.84-08-037. PG&E also was directed to meet with Cogen prior to the December 17 hearing for informal discovery.

With respect to the Drum Division access issue, the ALJ requested Northwest to provide copies of certain documents underlying Northwest's claim of priority in the Drum

Division. Mac Hydro and Northwest were allowed to submit briefs on the Commission's rules for establishing priority between QFs competing for limited transmission capacity.

On December 17, 1984, an evidentiary hearing was held. PG&E presented one witness, John E. Kerler, on the Intertie issue. After cross-examining PG&E's witness, Cogen made an offer of proof, describing the testimony and other evidence Cogen would sponsor, given the opportunity, on the Intertie issue. The ALJ then directed PG&E and Cogen to file statements assessing the impact of a Commission order releasing the transmission capacity currently held for Cogen to QFs on the waiting list and deferring resolution of the Intertie issue to the primary hearings on QF access to the Intertie.

QF Interconnection to the Intertie

The stipulation drafted by PG&E, staff, and IEP was applicable only to QFs located within PG&E's northern service area. Several QFs opposed the in-service area restriction and asked that the terms of the stipulation be extended to QFs outside of PG&E's [3] northern service area that are affected by expected transmission constraints in PG&E's northern system. In D.84-08-037, the Commission modified the stipulation and removed the in-service area restriction. The Commission stated that:

> "We find that any interim solution should be afforded to all QFs affected by potential transmission constraints in PG&E's northern system. At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries." (D.84-08-037, p. 8.)

On August 20, 1984, PG&E tendered to the Docket Office an application for rehearing of D.84-08-037. This application for rehearing was not docketed but was filed two days later

as a petition modification of D.84-08-037.[1] In its petition for modification, PG&E joined by IEP asked the Commission to exclude the Intertie from the terms of the stipulation. The Commission in D.84-11-13 issued November 21, 1984 granted a limited rehearing on this issue.

At an evidentiary hearing held December 17, 1984, PG&E's witness explained why the company believes the Intertie should be excluded from the stipulation. According to this witness, PG&E expects to use all of its capacity entitlement on the Intertie for the purchase of Northwest economy power. During the first ten months of 1984, PG&E used about 95% of available capacity on the intertie. [4] PG&E asserts that 100% use is prevented

---

[1] It is unclear whether the mere presentation of an application for rehearing rather than filing of the pleading by the Docket Office invokes a 60-day suspension period under Public Utilities Code Section 1733(a).

by minimum load hours, late reallocations of Intertie capacity, and BPA curtailments. PG&E submits that because of its expected use of the Intertie, no capacity on the Intertie is available to QFs.

Although PG&E's capacity entitlement on the Intertie may increase in February, 1985 and sometime in 1986, PG&E claims that enough Northwest economy power will be available through 1988 to use all additional capacity.

Finally, PG&E asserts that interruptible capacity cannot be made available to QFs since PG&E is contractually obligated to offer any interruptible capacity to municipals.

In summary, PG&E seeks to exclude the Intertie from the stipulation because QF interconnection to the Intertie may displace Northwest ecomony power. PG&E believes that all available capacity on the Intertie should be used for the transmission of economy power.

Cogen, in its offer of proof, indicated it was prepared to dispute PG&E's assertions on a factual basis and as a matter of policy. Cogen believes that PG&E's forcast of available Northwest economy power is overstated. Since the forecast is based on unusual weather conditions, Cogen presumably would seek to show that QF interconnection to the Intertie may not result in a one-to-one displacement of economy power if a more balanced forecast is made. Cogen also believes that QF offers of long-term firm supplies should not be rejected in favor of predictions of short-term economy power purchases. Thus, Cogen would argue that firm QF deliveries should not even be compared to economy power purchases.

[5] From the limited hearing permitted by the ALJ, we can see that QF interconnection to the Intertie raises complex questions of fact and broad policy issues. We are reluctant to

resolve, even on an interim basis, such a significant matter through an expedited hearing to which only a few parties are actively participating. Accordingly, we will continue the Intertie issue to the primary hearings on the bulk transmission issues to be set during March 1985.

If we should find after hearing that QF interconnection to the Intertie should be permitted, then we reserve for Cogen the possibility that interconnection can occur under the terms of the stipulation. The 1150 MW ceiling may be raised to accommodate the projects for which Cogen has acquired priority within the current ceiling. At the same time, we direct PG&E to release the transmission capacity currently reserved to Cogen to the next QF projects on the waiting list. We see no reason why this capacity which is attributable to non-Intertie transmission upgrades or other altered operating practices should be held pending our decision on this matter.

* * *

[9]

Findings of Fact

1. PG&E believes that QF interconnection to the Intertie will result in the displacement of Northwest economy power.

2. Cogen is prepared to dispute PG&E's forecast and argues that long-term firm QF supplies should not be compared to short-term economy power purchases.

3. The question of QF interconnection to the Intertie should be addressed in the primary hearings on the bulk transmission issues to be held in March, 1985.

* * *

[10]

Conclusions of Law

1. Resolution of the Intertie issue should be continued to the primary hearings in this proceeding so that all parties may fully participate on this matter.

* * *

Excerpts from California PUC Decision
No. 85-04-075,
dated April 17, 1985

COM/mra

Decision 85-04-075 April 17, 1985

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Second Application of PACIFIC GAS & ELECTRIC COMPANY for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2	Application 82-04-44 (Filed April 21, 1982; amended April 28, 1982, July 19,1982, July 11, 1983 and August 2, 1983)
And Related Matters	Application 82-04-46 (Filed April 21, 1982; amended May 12, 1982, July 11, 1983, and August 10, 1983)
	Application 82-04-47 (Filed April 21, 1982; amended July 11, 1983 and August 2, 1983)

I N T E R I M O P I N I O N

I. Summary

This decision continues the suspension of Payment Option No. 3 of interim Standard Offer (SO) 4 for Qualifying Facility (QF) projects

over 50 megawatts (MW), which had been ordered earlier for Pacific Gas and Electric Company (PG&E) and Southern California Edison (SCE). It also extends the suspension of projects over 50 MW to Payment Option No. 3 of interim SO 4 for San Diego Gas and Electric Company (SDG&E). It presents two options for comment regarding continued availability and terms of all Payment Option No. 1 and Payment Option No. 2, and of Payment Option No. 3 for projects less than 50 MW, prior to availability for a final long-run standard offer.

[2] In assessing whether the existing standard offers continue to provide a reasonable protection for ratepayers, we have relied primarily on the utility filings of the results of project information questionnaries sent to QFs as part of our adopted Interconnection Priority Procedure (IPP), and

on the information contained in the utilities' most recent Quarterly Status Reports (QSRs) containing data current through the end of 1984. We conclude that the capacity payments in the interim SO 4 and the energy payments in Payment Option No. 1 and Payment Option No. 2 of the interim SO 4 would over-value additional QF projects not already under contract to the utilities. This is true for all sizes of QF projects and for SDG&E as well as for PG&E and SCE.

The Public Staff has recommended an immediate suspension of all payment options of interim SO 4 for PG&E and SCE until a final SO 4 is available, unless prices are adjusted to reflect current conditions. We agree with Public Staff that further study is needed of the implications of large cogeneration projects over 50 MW for utility resource planning purposes. Because of the potentially large impact of such projects on system

avoided costs, we prefer that they not be allowed to sign Payment Option No. 3 until we understand more fully the utilities' long-run costs avoided by such projects as part of Phase II of the current long-run pricing proceeding.

Such caution does not appear warranted for other projects, however. Because of our continued wish to encourage cost-effective QF development, and because of the continued uncertainty regarding how many signed QFs will actually complete their projects and operate successfully, we are reluctant to suspend interim SO 4 entirely. At the same time, because of our desire to not delay further the development of a final SO 4, we see only one other realistic approach to providing for the protection of ratepayers at this time: that is for us to modify the interim SO 4 prices offered to new QFs which have not yet signed contracts to a level which reflects the value of additional QF projects more realistically.

This action would [3] maintain the availability of interim SO 4 contracts for most projects while final SO 4 terms are being developed, yet not unduly delay the final SO 4 proceedings.

With this in mind we present a method for adjusting the capacity payments in PG&E's and SCE's interim SO 4 contracts, based on calculations provided by our staff at the request of the assigned Commissioner, and detailed in Appendix A. The capacity payments in SDG&E's interim SO 4 would be modified to those adopted for its SO 1 and SO 2 in its most recent general rate case. We also propose that the energy payments in Payment Option No. 1 and Payment Option No. 2 be reduced by 10 percent, but conclude that no adjustment to the incremental energy rates in Payment Option No. 3 for projects under 50 MW is warranted at this time.

The revised interim SO 4 contracts would be in effect for each utility only until a set amount of new QF capacity enters into contracts, standard or non-standard, with the utility. That amount is 1,250 MW for each of PG&E and SCE and 200 MW for SDG&E, counted from April 17, 1985. At that point, all of interim SO 4 would be suspended for that utility until a final long-run standard offer becomes available. Projects signing revised interim SO 4 contracts would have to comply with the milestones adopted in our Interconnection Priority Procedure.

We provide for a workshop on May 3, 1985, in which staff will be available to answer any questions parties may have regarding the calculations underlying the capacity adjustments, and for parties to file written comments by May 10, 1985, stating whether they prefer complete suspension of interim SO 4 or implementation of the capacity and energy

payments presented in this decision. Based on the filed comments, we plan to choose between the two approaches by June 5, 1985.

To prevent a "gold rush" of projects wanting to sign the current interim SO 4, we suspend all payment options of interim SO 4, effective immediately, pending further Commission action.

* * *

[15] It is obvious that significant changes have occurred in the energy markets since the negotiating conference was held in June 1983. Natural gas prices have stabilized and even fallen, and further reductions are quite possible. In Table 5, the incremental costs of natural gas to PG&E, Southern California Gas Company (SoCal), and SDG&E are shown. PG&E and SDG&E have experienced substantial price reductions in the last 20 months, and if the effects of inflation were removed, Table 5 would show that SoCal's incremental cost of

gas has also decreased, in real terms. There are at least two other easily available comparisons which provide a measure of changes in the utilities' avoided energy prices: The rates which utilities pay for natural gas for use in their own generating units (Table 6) and the avoided cost prices paid to QFs [16] operating with short-run standard offer contracts (Table 7). Natural gas rates for electric generation have declined for all three utilities, from 2 percent to 17 percent. SCE's and SDG&E's short-run avoided cost energy payments have declined substantially, by 11 percent and 15 percent respectively. PG&E's energy payments have increased dramatically, due to higher incremental energy rates adopted in its December 1983 general rate case decision. However, as pointed out in Table 7 (see also Table 14), that rate case decision also authorized PG&E to reduce its short-run

avoided cost energy payments about 20 percent after Diablo 1 and Diablo 2 become commercially operable. At current gas prices, these payments would be reduced to about 5.4 cents per kilowatt-hour, which is about 7 percent less than the June 1983 level.

While we do not know what energy price forecasts were relied upon by the parties to the negotiating conference, we suspect that they did not predict the current turn of events. Thus, the energy components of interim SO 4 may be overstated. The rapid rate at which PG&E and SCE have signed interim SO 4 contracts indicates that the overall pricing terms, including both capacity and energy provisions, may be seen as very favorable by QFs.

If significant amounts of additional QF projects are allowed to sign contracts with the prices currently offered, ratepayers may indeed, as PG&E and SCE assert, be required to pay more for the capacity and electricity than

is reasonable. Because of this possibility, we agree with PG&E, SCE and our staff that some action must be taken to protect ratepayers. The partial suspension cannot merely be allowed to lapse.

* * *

[22] As described in Appendix A, additional capacity is valued based on utility reserve margins under each of three scenarios. Additional capacity was assumed to have the full value of a gas turbine in any year in which the reserve margin without it would fall below 20 percent, and to have no value if the reserve margin without it would be greater than 35 percent. The assumed capacity value varies linearly between the value of a gas turbine and zero for reserve margins between 20 percent and 35 percent. For each scenario, staff provided a table of levelized prices for a 1,000 MW block of additional firm capacity.

In Table 8, we present some of the results for PG&E and SCE for the scenario of 80 percent QF development. For this scenario, application of the above formula indicates that the capacity value of [23] a QF signing a 20-year contract for firm operation beginning in 1986 should be 35 percent of that in PG&E's current interim SO 4 if it signs with PG&E but 78 percent of that in SCE's interim SO 4 if it signs with SCE. This striking difference between the capacity value of additional capacity to the two utilities carries over to the other scenarios analyzed as well. Comparable results for the 30 percent QF development scenario still show capacity values to be only 50 percent of PG&E's current interim SO 4 capacity payment, but 93 percent of SCE's, for a QF committing to 20 years of firm operation beginning in 1986.

Because of the large amounts of QF projects which have signed contracts with PG&E

and SCE since interim SO 4 was negotiated, and because our analysis of the effects of such capacity indicates that the value of additional QF capacity to the utilities and ratepayers is significantly less than the capacity payments now in interim SO 4, we conclude that the capacity payments in PG&E and SCE's interim SO 4 should be adjusted if it continues to be available for new projects. Since large amounts of QF projects are still under discussion, we conclude further that update capacity payments should be based on allowing 1,000 MW of additional capacity to enter into contracts (standard or non-standard) with the utility.

* * *

Excerpts from California PUC Decision
No. 85-06-163,
dated June 27, 1985,

A.82-04-077, et al. ALJ/vdl

[2]

OPINION ADDRESSING PETITIONS FOR MODIFICATION OF DECISION 85-04-075

On April 17, 1985, the Commission issued Decision (D.) 85-04-075 in Application (A.) 82-04-44, et al. This decision followed a series of orders suspending portions of interim Standard Offer 4 for utility purchase of electricity from qualifying facilities (small power producers or cogenerators). A description of the procedural history leading to D.85-04-075 is fully recited in that order and need not be repeated here.

By D.85-04-075, the Commission ordered the suspension of Interim Standard Offer 4 in its entirety for Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison), and San Diego Gas & Electric Company (SDG&E). The suspension for

qualifying facility projects of greater than 50 MW under Payment Option #3 of the standard offer was made "for an indefinite period." For all other projects proposed under Standard Offer 4, the suspension was made effective until further order of the Commission. D.84-05-075 itself was made effective the date of issuance (April 17, 1985).

In additional to the suspension of interim Standard Offer 4, D.85-04-075 also directed the Commission's Public Staff to conduct a workshop on May 3, 1985. At this workshop, Public Staff would explain and answer questions regarding revisions proposed by D.85-04-075 to energy payments under Payment Options #1 and #2 and capacity payments under all interim Standard Offer 4 payment options. Interested parties were given the opportunity to file written comments no later than May 10, 1985. By these comments, the parties were to state their

preference for the indefinite suspension of all of interim Standard Offer 4 or the implementation of revised energy and capacity payments proposed in D.85-04-075.

In addition to the numerous comments which have been received in response to D.85-04-075, the Commission, beginning on [3] May 9, 1985, has received multiple petitions for modification of the decision. To date, the following filings have been made: 20 petitions for modification filed by interested parties, two petitions for modification filed by utilities, four interested party responses to the utilities' petitions, three utility responses to interested party petitions, and a Public Staff Division (Public Staff) response to the petitions as a whole. The Commission's review of the comments is discussed in another decision to be issued shortly, while the subject of the petitions and related responses is reserved to this order.

The common thread joining most of the petitions for modification is the issue of whether an interim Standard Offer 4 signed by a qualifying facility, but not the utility, prior to April 17, 1985 (the effective date of D.85-04-075) is a valid contract for the sale of electricity.[1] While certain of the petitions present variations on this issue (e.g., a fully negotiated agreement which the utility had not signed), the focus of all of these petitions concerns the time of contract formation - a critical factor in the face of the suspension of interim Standard Offer 4.

---

1 The petition filed by the State Department of General Services does not raise this issue, but rather seeks an exemption from any interim Standard Offer 4 suspension for certain State facilities. This petition is more appropriately addressed in the order dealing with comments on the suspension and is therefore discussed in a separate decision to be issued shortly as a companion to this order. The petition filed by the Los Angeles Sanitation District is also addressed in that decision since its concerns are directed to the propriety of the suspension itself.

In the petitions, a number of interested parties refer to the utility statements made during the May 3 workshop. According to these petitions, the utilities, in particular Edison and PG&E, had represented that each had received numerous interim Standard Offer 4 agreements signed by qualifying facility in the weeks and days prior to the issuance of D.85-04-075. In PG&E's view, this action was [4] taken by qualifying facilities in response to the rumor in that community of the imminent suspension of interim Standard Offer 4.

In all cases, except those identified in Edison's petition, Edison was able to complete and sign the agreements which were submitted to it by the qualifying facilities. The same was apparently true for SDG&E. PG&E, however, indicated that it had not signed most of the agreements submitted in this manner.

In reviewing the petitions, we will commence with a summary of the petitions filed by PG&E and Edison. These petitions identify the general nature of the problem, the total number of agreements involved, and each utility's response. SDG&E did not file a petition, but rather a response to the petition of an interested party. While this response discloses the utility's position on the issue, we will reserve a summary of its contents for our section dealing with responses to petitions. This summary follows our review of the interested party petitions.

We note that several parties also submitted comments and letters on the issue of the unsigned standard offers. We believe that the petitions present a full description of and the potential approaches to the issues. This decision will, therefore, focus on those pleadings.

I. Petitions for Modification

A. Utility Petitions

1. PG&E

In response to the numerous contracts submitted to it prior to April 17, PG&E decided not to take "extraordinary measures" to execute these agreements, but rather to follow its normal procedures. According to PG&E, these procedures include confirmation that the qualifying facility has demonstrated site control and completed a questionnaire, both requirements of the Qualifying [5] Facility Milestone Procedure (QFMP).[2] After determining compliance with the QFMP, PG&E next confirms that the submitted agreement has been adequately and

---

2 The QFMP is a procedure to establish interconnection priority among qualifying facilities. The procedure was adopted in D.85-01-038 in Order Instituting Investigation (I.) 84-04-077, this Commission's investigation into transmission constraints impacting qualifying facility development.

correctly completed and reviews and approves any requested nonstandard language.

Between January and April 1985, PG&E received a total of 157 purchase power agreements. Of this number, 64 were "fully executed," which PG&E defines as signed by both the qualifying facility and the utility. The other 93 were signed by qualifying facilities, but not by PG&E, before April 17. PG&E believes that these 93 agreements fall into five basic categories:

1. Twenty-six contracts involving projects attempting to switch from Standard Offer 1 to interim Standard Offer 4 which were signed by PG&E on the morning of April 17 before D.85-04-075 was known to the utility.

2. Six contracts received by PG&E one week before the decision, but not signed by the utility by April 17. Three had failed to provide proof of site control, one requested non-standard language which required additional time to approve, and two were delivered on April 5 and 9 to "a coordinator who was out of the office during this period." (PG&E Petition, p. 4.)

3. Forty-four contracts received on April 12, 15, and 16 which PG&E states it did not have enought time to process and sign. Fifteen of the 44 contracts failed to provide proof of site control.

4. Five contracts signed by qualifying facilities before April 16, but received by PG&E between April 17 and April 23.

[6] 5. Twelve projects which "unsuccessfully" attempted to switch from Standard Offer 1 to interim Standard Offer 4.

PG&E states in its petition that its decision not to sign or deliver these contracts was based on (1) discussion during the Commission meeting on April 17 regarding the uncertain status of the tendered agreements and (2) the conclusion in D.85-04-075 that capacity and energy payments under Options 1 and 2 of interim Standard Offer 4 would overvalue additional qualifying facility projects not already under contract to the utilities. Under these circumstances, PG&E states that "a Commission order requiring PG&E to buy the block of power

represented by the contracts in question under the terms of the now suspended SO #4 would result in overpayments and would not provide the needed flexibility of dispatch." (PG&E Petition, pp. 5-6.) PG&E therefore asks the Commission to modify D.85-04-075 "to make clear that tendered SO #4 contracts not signed by PG&E before April 17 do not constitute valid executed contracts and PGandE [sic] no obligation to execute them." (Id.)

If its position is not adopted, PG&E suggests five alternatives as "equitable" solutions to the problem These alternatives include (1) a direction by the Commission that all tendered contracts be executed, but that the QFMP procedure be met within 60 days; (2) Commission authorization of only those contracts which have been the subject of ongoing contact and discussions with PG&E; (3) the offer of the revised Standard Offer 4, if adopted, to the 93 qualifying facilities at

issue here; (4) the establishment of a cut-off dat for tendered contracts (e.g., five days prior to April 17); or (5) the review of special circumstances in response to individual qualifying facility petitions or complaints.

2. Edison

In its petition, Edison states that between April 1 and April 17, 1985, it received numerous purchase power agreements from [7] qualifying facilities. During that time period, Edison reviewed these agreements for accuracy and executed more than 85 purchase power agreements. In executing this large number of agreements, however, Edison states that it "overlooked" two projects -- the China Lake Joint Venture No. 2 and Coso Geothermal Company. Edison notes that both projects are represented by California Energy Company, Inc.

According to Edison, on January 1, 1985, California Energy Company, Inc. submitted to Ediso executed interim Standard Offer 4 agreements for

the two projects. At that time, however, California Energy Company, Inc. did not supply the proof of site control, project description, and preliminary development schedule required under the QFMP. The necessary information, however, was received by Edison on April 1, 1985.

Edison states that these facts demonstrate that all of the prerequisites to Edison's execution of these agreements, including a "meeting of the minds," had been satisfied prior to April 17, 1985. Edison's failure to sign the agreement prior to April 17 was solely the result of its heightened activities to ensure that all agreements were executed. Edison therefore asks that the Commission issue an order confirming that these two qualifying facility projects not be made subject to the suspension order in D.85-04-075 and that the agreements be ordered executed.

* * *

[13] 15. Cogeneration Services - Cogeneration Services presents facts somewhat different than those contained in the preceding petitions. Cogeneration Services represents 14 projects for which it tendered contracts to PG&E. These projects, however, were the subject of a petition for modification by PG&E of D.84-08-037. This petition addressed the applicability of the Commission's interim solution to transmission constraints to these projects. A hearing on this matter was ordered, and PG&E has declined to process these contracts until the matter is resolved.

> Cogeneration Services asks that it be made clear by the Commission that D.85-04-075 was not intended to apply to these agreements. Any other conclusion would, according to Cogeneration Services, be grossly inequitable since these projects have long been ready to proceed, but have been delayed only by the Commission's own process.

* * *

[18]

C. Responses to Petitions

1. Utility Responses

a. PG&E

While stating that it does not waive its right to address the petitions on an individual basis, PG&E responded to the

petitions as a whole. PG&E states that the interested party petitions should be denied because they are based on flawed legal arguments. In particular, PG&E asserts that traditional contract law does not govern standard offers. According to PG&E, "standard offers are the product of regulation, not free negotiation between parties, and as such they are subject to the continuing authority of the regulatory agency, not to the traditional law of contracts." (PG&E Response, p. 3.)

In support of this assertion, PG&E states that the Commission has expressly rejected the intent of the parties as a determinative factor in resolving standard offer disputes and has unilaterally ordered changes to existing, fully executed contracts between PG&E and qualifying facilities. PG&E cites D.84-08-031, Finding of Fact 17, and D.84-03-092, Ordering Paragraph 20,

respectively, in support of these assertions. PG&E further states that even if the qualifying facilities' offer-and-acceptance analysis [19] were applicable to standard offers, the Commission would have continuing jurisdiction to modify or terminate the contract as the public interest requires. PG&E contends that this rule, applicable to agreements with public utilities, is a recognized exception to the impairment of contract prohibition.

PG&E also states that in not signing the contracts and filing a petition, it was not in violation of any law or Commission decision. PG&E further asserts that its actions were not a deliberate attempt to reject Standard Offer 4 agreements. Rather, PG&E contends that the petition was a legitimate response to Commission statements at its April 17 meeting regarding uncertainty

about the status of the agreements and the Commission's concern with the impact of the agreements on ratepayers.

The only petition to which PG&E specifically responds is that filed by Cogeneration Services. PG&E states that the Commission should not be misled by Cogeneration Services' claim that the pendency of Commission action on the applicability of the QFMP to the Cogeneration Services agreements is the only reason for its contracts not being executed by PG&E. PG&E states that these contracts were also flawed because they involved qualifying facilities outside PG&E's service territory to whom the standard offers do not apply, they were completed incorrectly, and they were otherwise deficient. For these reasons, PG&E does not believe that the Cogeneration Services' agreements should be exempted from the operation of D.85-04-075.

b. Edison

Edison's response is directed exclusively to the petition of Energy Distribution. Edison states that it has no mandatory requirement that the purchase power agreement and the interconnection agreement be completed simultaneously, as claimed by Energy Distribution. Edison states that Energy Distribution's [20] requested purchase power agreements were not executed by Edison because they failed to comply with the QFMP. In particular, Edison has never received proof of site control or a completed project definition. Under these circumstances, Edison asks that the Commission deny Energy Distribution's request that the subject purchase power agreements be executed by Edison.

c. SDG&E

Although SDG&E entitled its filing as a response to Mega Renewable's

petition, it is actually a general statement on the issue of the agreements which were not signed by PG&E. SDG&E states that it "is clearly not the case" that Standard Offer 4 constitutes a legal offer under common law. According to SDG&E, the standard offer is merely a contract form which has numerous conditions precedent to the utility's signature and execution of the agreement. These conditions include satisfying the QFMP requirements (site control), filling in the standard offer blanks correctly, and having the agreement approved by utility corporate management. SDG&E states that the Commission's D.85-02-038, which adopted the QFMP, established the utility's "discretion" to screen qualifying facility projects prior to the utility deciding to enter a purchase power agreement.

* * *

[23] 3. Public Staff Response

Public Staff believes that "[g]iven the abundance of QF capacity, ...it is reasonable to require the utilities to sign contracts only for those QFs which PG&E and SCE were prepared to sign and any other projects which can meet the requirements of the QFMP." (Public Staff Response, p. 3.) Public Staff also notes that switching between Standard Offer 1 and interim Standard Offer 4 should be allowed only if the requirements of D.83-09-054 are met. In D.83-09-054, we stated that "QFs under standard and nonstandard contracts, with provisions clearly allowing them to switch, may switch after a final standard offer comes into existence after hearing, but for the time being they will have to honor their commitment under the contracts they entered." (D.83-09-054, p. 17.)

II. Discussion

The disparate positions of the utilities and qualifying facilities on the subject of PG&E's unsigned agreements require the Commission first to review the requirements of our decisions affecting standard offer contract formation. This step is necessary since we intend our findings and conclusions in this decision to be based on those orders.

Our issuance of D.82-01-103 on January 21, 1982, in Order Instituting Rulemaking 2 marked the inception of the standard offer. As that decision states, federal and state law mandated the Commission to implement the requirement of electric utility purchases of energy and capacity from qualifying facilities. In establishing the guidelines for such utility purchases, we ordered the utilities to file five standard offers "each of which would be a complete contract which small power producers could sign without

negotiations." (D.82-12-120, p. 3.)

[24] In defining the standard offer in D.82-01-103, we found that the rate for the power purchase had "relevance only in relation to the mutual obligations of the parties." (D.82-01-103, p. 24.) The nature and extent of those obligations were to be defined by the standard offer. We further concluded:

> "The term 'standard offer' is itself an oversimplification. This decision directs that each utility offer a choice of contracts at the seller's option. These choices are intended to be economically equal over the life of a contract." (Id., p. 29; emphasis added.)

This discussion was the basis for Finding 26 and Ordering Paragraph 25 of D.82-01-103. The finding defines the standard offer as "a choice of contract terms at the QF's sole option." (Id., p. 148.) The orders direct that the "standard offer shall be available to all QFs for acceptance and shall be consistent with the terms and conditions provided for in this decision." (Id., p. 162; emphasis added.)

The standard offers governed by D.82-01-103 included Standard Offers 1, 2 and 3, based on the utility's short-run marginal costs and the subject of A.82-03-26, et al., as well as Standard Offer 4, based on the utility's long-run avoided costs and the subject of the instant applications. Evidentiary hearings to approve and establish the contract terms of Standard Offers 1, 2 and 3 followed the issuance of D.82-01-103. The series of decisions which resulted from those evidentiary hearings also impacted Standard Offer 4. Not only did the decisions further define the concept of the standard offer, but many of the terms of Standard Offers 1, 2 and 3 were incorporated in the interim Standard Offer 4 which was adopted in D.83-09-054.

Each of the utilities was not only an active participant in the evidentiary hearings establishing the terms of Standard Offers 1, 2

and 3, but also the negotiating conference which led to the [25] adoption of interim Standard Offer 4. The key concern of all of the orders resulting from both proceedings was the establishment of the mutual obligations of the parties. These contract terms were to be binding on the utility and altered only by the Commission or by a qualifying facility if it sought a nonstandard agreement.

In response to requests for uniform standard offer language, in both D.83-10-093 (A.82-03-26, et al.) and D.83-09-054 (A.82-04-44, et al.) we rejected the utilities' argument that the Commission's role was not to write contracts for the utilities. We concluded instead that uniform standard offer language should be used by all utilities except for terms which must clearly be utility specific because of substantive differences between the utilities. We directed the

utilities and staff to work together in proposing one form of contract for each of the four standard offers. (D.83-10-093, pp. 74-75; D.83-09-054, pp. 21-22.)

In D.83-10-093, we also rejected proposals (1) that certain portions of the standard offers be negotiable, (2) that the utilities be authorized to alter nonprice provisions without jeopardizing the standard offer's status, and (3) that the standard offer status be extended to those contracts whose terms vary from the standard offer. (Id., p. 78.) Our action was premised in part on the conclusion in D.82-01-103 that utility costs incurred and prices paid under the standard offers are per se reasonable and recoverable in ratemaking proceedings. We were not willing to guarantee such cost recovery when terms were not identical to those which we had approved. We noted,

however, that the risks of nonrecovery become proportionately less when the variations from the standard offer are only slight. (D.83-10-093, p. 77.)

In D.84-03-092, the Commission was faced with a factual circumstance which appeared to indicate that PG&E had failed to [26] follow prescribed standard offer procedures. Most notable was PG&E's apparent addition of language to its standard offers which the Commission had never reviewed or approved. In addition to finding such a term null and void, we also concluded that a unilateral change to a standard offer by a utility without this Commission's review or approval was actionable by a complaint to the Commission. (Findings 54, 59, p. 91.) PG&E's apparent violations resulted in our issuance of an Order to Show Cause why PG&E should not be held in contempt for its failure to comply with Commission orders. (D.84-03-093.)

Following hearings on the Order to Show Cause, the Commission issued D.84-08-031. In that order, we concluded that PG&E should not be found in contempt of this Commission having either not violated the orders of the Commission or not having had the requisite intention to violate these orders. PG&E's actions, however, were the basis for restating and modifying certain commission rules governing interconnection between qualifying facilities and utility-qualifying facility negotiations. The offers to which PG&E had added the language were found to be negotiated, nonstandard agreements. However, PG&E's approach to these negotiations required the Commission to reiterate and more fully developed the "good faith" bargaining required of the utility in such negotiations. Specifically, Ordering Paragraph 3 of D.84-08-031 states:

> "All utilities shall follow the guidelines set forth at p. 106 of D.82-01-103 in negotiating contracts with

> QFs. The utility's role in these negotiations shall be limited to responding to a QF's proposed modification of the standard offer with counterproposals which are related to the QF's proposed modification and, in the utility's view, are necessary to maintain the economic balance of the standard offer. A proposed modification to a standard offer by a QF shall not result in making all terms of the offer or agreement negotiable. A utility's failure to follow these guidelines shall be evidence of its failure to negotiate with the QF in good faith."

[27] The only Commission orders cited by PG&E in support of its position not to sign the agreements tendered by qualifying facilities before April 17 relate to the Order to Show Cause. We agree with Oakland Scavenger that the references upon which PG&E relies neither stand for the propositions for which they were cited nor are they relevant to the issue of contract formation. In D.84-08-031, we did not, as asserted by PG&E, reject the parties' intent as a basis for contract language interpretation, but in fact found that evidence of a particular intent would "[require] us in turn to accept that

interpretation of the language." (D.84-08-031, p. 39.) In this regard, we found that PG&E had presented insufficient evidence to support its claim that both parties to the negotiation intended the disputed contract provision to be a "notice" clause, an interpretation favored by PG&E.

In its response PG&E also cites D.84-03-092. This order was referenced in support of PG&E's assertion that we had previously unilaterally ordered changes to existing, fully executed contracts between PG&E and qualifying facilities. By the ordering paragraph cited by PG&E, however, we did not retroactively modify the terms of any agreement. Rather, the order was directed at prohibiting PG&E from unilaterally modifying standard offers by adding contract language to those offers. (D.84-03-092, Ordering Paragraph 20, p. 100.) Our declaration in that order that any such provision was a

nullity was intended to reflect our commitment to our prior orders preventing utility additions to the standard offer, to remove the offending clause, and to restore the agreement to its proper form. As noted above, the questioned agreements were later found to be nonstandard offers to which additions could be made, but for which PG&E was obligated to bargain in good faith.

With respect to the argument that this Commission has continuing regulatory authority over the standard offers, we believe that our approach to the "regulatory authority" clause suggested for inclusion in interim Standard Offer 4 is particularly relevant. As [28] proposed by the utilities, this clause would have provided that the contract would "at all times be subject to such changes as any regulatory agency may direct in the exercise of its jurisdiction." (D.83-09-054, at p. 39.) According to the clause, any conflict

between the contract's provisions and changes directed by the agency would require the parties to amend the contract in conformance with those changes.

In reviewing this clause, we concluded that it should be removed from Standard Offer 4. This decision was based on our holding in D.83-09-054 that "[a]ny changes made to this standard offer in the future will only apply to those contracting after such changes." (D.83-09-054, p. 3.) We had also found that, other than conformance with certain terms adopted for Standard Offers 1, 2 and 3, "[a]ny other ordered changes to Standard Offer #4 will be for prospective application only in new contracts." (Id., Ordering Paragraph 1, p. 57.) We therefore concluded:

> "In view of our holding that contracts entered under Standard Offer #4 will not be subject to retroactive change based on prospective developments in the continuing saga of pricing QF power, we think the regulatory authority clause should be deleted. . . . [T]he quid pro quo for giving QFs certainty with respect

to all contract terms, and eliminating the regulatory authority clause, is that QFs may not freely switch to other contracts later, until their contract term is up, if subsequent contracts or terms appear more favorable. . . . In ordering the clauses removed we recognize that we cannot order retroactive changes to interim Standard Offer #4 contracts..." (Id., pp. 39-40; emphasis added.)

No matter what our continuing regulatory authority could have been, we clearly elected in D.83-09-054 not to exercise such authority with respect to Standard Offer 4 on a retroactive basis. In suspending the standard offer in D.85-04-075, we have honored this commitment to alter that offer on a prospective basis only. We intended, as the interested parties state in their petitions, that [29] the suspension would apply only to those QFs who had not signed an interim Standard Offer 4 agreement before April 17, the effective date of D.85-04-075.

For those offers signed by qualifying facilities before April 17, the sole issue then is when contract formation took place. In the case of a standard offer, we believe

that our prior orders have provided us with clear directions on this issue. Those decisions, as recited above, demonstrate that the standard offer is to be a contract in the "traditional" legal sense and not just a form requiring further utility negotiation or approval. The "offer and acceptance" theory of mutual assent to contract terms is precisely the approach we adopted for the standard offer. The terms of the agreement are those which the utility is obligated to offer, which the utility has participated in crafting, and from which no utility can deviate, except in the case of a nonstandard agreement. The offer embodying those terms is to be extended by the utility to all qualifying facilities for their "acceptance." Once accepted, the utility is to have no discretion in refusing the agreement or altering its terms. A contract is formed with the qualifying facility's acceptance of those

terms which would be indicated by a standard offer completed and signed by the qualifying facility and delivered to the utility.

Utility practice in "reviewing" these agreements, as explained in their filings, is evidence of their understanding of this adopted approach. Except for implementing the requirements of the QFMP, discussed below, the utility's review has been limited to determining whether the qualifying facility has properly filled in the blanks and signed the agreement. Obviously, the qualifying facility cannot be said to have "accepted" the offer until it has performed these tasks. However, when it does, a "meeting of the minds" would occur with the result that the utility's signature on the agreement becomes a mere formality which necessarily follows. [30] The only exception which can arguably be asserted to this approach to standard offer contract formation was created this year in

I.84-04-077. This proceeding, which was separate from the standard offer applications, was noticed as the Commission's investigation into utility transmission system operations "regarding transmission constraints on cogeneration and small power production development."

In I.84-04-077, a committee comprised of representatives of utilities, qualifying facilities, and Public Staff prepared a "milestone procedure" to measure the progress of each qualifying facility's development. The procedure, originally designated an interconnection priority procedure (now QFMP), established a priority among qualifying facilities for line capacity according to the date on which the qualifying facility completed all of the following three items: (1) a project definition, including proof of site control; (2) an interconnection study

request; and (3) the payment of a $5/kW project fee into an escrow account.

We state in the decision that one of these criteria, "project definition, including proof of site control, must be provided prior to signing a PPA [purchase power agreement] or requesting an interconnection study" (D.85-01-038, p. 4). No mention of this requirement, however, is made in the procedure itself which we appended to the decision and adopted in the sole ordering paragraph.

It is only in the "Interconnection Priority Policy Questions & Answers," Appendix B to D.85-01-038, that any mention is made of the qualifying facility's signature of a purchase power agreement being conditioned upon meeting any QFMP criteria. This appendix first indicates that qualifying facilities not located in a constrained area must meet their development schedules. (D.85-01-038, App. B, p. 3.) Under the heading "Screening Criteria,"

it also states that the QFMP requirements of project definition, [31] including proof of site control and a preliminary development schedule "must be provided prior to signing a power purchase agreement or requesting an interconnection study." (Id., p. 5.)

While I.84-04-077 had first been initiated to establish a priority among qualifying facilities seeking limited line capacity, by the time D.85-01-038 was issued the scope of the proceeding had broadened. Specifically, we had by that time found four uses of the procedure: (1) to determine which qualifying facilities were entitled to limited transmission capacity; (2) to establish on-going statewide interconnection priority procedures; (3) to determine the current status of qualifying facility development in the state; and (4) to establish an on-going tracking of qualifying facility development to aid in transmission and resource planning.

These last two purposes would obviously be served by imposing limitations or conditions on the qualifying facility's ability to sign standard offers or negotiated agreements with the utility.

D.85-01-038, however, did not require that any of the "screening criteria" become part of the adopted standard offer terms. I.84-04-077 itself, while evolving to have a broader purpose, was also never suggested as being a proceeding in which changes to the standard offer or standard offer procedures would be addressed. We note, as exemplified by Edison's response to Energy Distribution's petition and PG&E's handling of the Oakland Scanvenger agreements, that simultaneous signing of an interconnection agreement (which would deal with line capacity) and a standard offer has never been required.

We feel that this circumstance, as well as a lack of clarity as to the precise

requirements each qualifying facility was to meet before signing a standard offer, may have led to qualifying facilities being inadequately notified of their altered responsibilities in signing the interim Standard Offer 4. Further, [32] our decision contains no direction to the utilities regarding the manner in which the qualifying facilities were to be informed of this change in their obligations.

Although many qualifying facility representatives participated in the development of the QFMP, we suspect that many others were not and never have been participants in our proceedings. The list of those filing petitions to challenge PG&E's inaction is revealing in this regard since many are first-time appearances before the Commission.

Given our prior orders and the circumstances surrounding our adoption of the

QFMP, we believe only one solution to the issue of the unsigned contracts is appropriate and reasonable. Specifically, we will direct the utilities, in particular PG&E, to sign all of the interim Standard Offer 4 contracts which were properly completed and signed by the qualifying facility and delivered or deposited in the mail to the utility before April 17. Compliance with the QFMP will also be required, but in the manner specified below.

PG&E has asserted that certain agreements were signed by the qualifying facilities before April 17, but not received by PG&E until after date. We believe that to be effective the acceptance must have been communicated to the offeror before the suspension was ordered. This requirement is adequately met by the offeree having had the agreement personally delivered or deposited in the mail before April 17. A postmark would serve as evidence of the date of mailing.

With respect to the QFMP screening criteria (project definition and preliminary development schedule), we believe that such requirements are valid and necessary prerequisites for every qualifying facility signing an interim Standard Offer 4, whether or not the project is located in a constrained area. To correct any potential deficiencies in D.85-01-038 which may have impacted a [33] qualifying facility's knowledge of those requirements, however, we will direct that the following procedures be used.

First, we address those qualifying facilities who tendered interim Standard Offer 4 agreements in the manner specified above and had complied with the QFMP screening criteria before April 17. For those qualifying facilities, the utility will be required to sign the agreements and return a copy of the executed contract to the qualifying facility

within one week of the effective date of this decision.

Second, for those qualifying facilities who had similarly tendered signed interim Standard Offer 4 agreements to the utility before April 17, but had not yet complied with or completed the QFMP screening criteria, we find that the qualifying facility's signature on the agreement was not an effective acceptance of the standard offer. However, to cure any confusion resulting from D.85-01-038, we will allow these qualifying facilities 60 days from the effective date of this decision in which to comply with the QFMP screening criteria. We will direct the utilities to notify each of the affected qualifying facilities by writing within one week of the effective date of this order of the qualifying facility's obligation to comply with the QFMP screening criteria. The notice should include the exact information the qualifying facility

is to supply to the utility (project definition, including proof of site control and a preliminary development schedule) and the time period permitted for such compliance (60 days). It should further be explained that the qualifying facility's signature on its tendered agreement will not become valid until these requirements are met.

Upon submission of the necessary information by the qualifying facility, the utilities will be directed to indicate in writing to the qualifying facility whether it has complied with the QFMP screening criteria. We will direct that this notice is to be sent within five days of receipt of the necessary information. In [34] the event of noncompliance, the utility will be required to specify the shortcoming, with the qualifying facility being given any remaining part of the 60-day period to cure its submittal. Should the utility determine that the qualifying

facility has complied, the qualifying facility's signature on the agreement will become immediately valid and the utility will be required to sign the agreement and return a copy of the executed contract to the qualifying facility within one working day of the utility's compliance determination.

Our requirement of compliance with the QFMP reflects our continued support for the procedure not only as a means of establishing priorities for scarce line capacity, but also for determining the viability of each qualifying facility project. The knowledge gained from the QFMP has proved critical in recent months, especially with respect to resource planning. We note that the suspension of interim Standard Offer 4 has largely been in response to concerns that available capacity from qualifying facilities could exceed utility needs. This circumstance is a significant factor in our efforts to

ensure that the interests of ratepayers are adequately considered. The concept of ratepayer indifference, which has guided us in the pricing of qualifying facility power, would be lost if the cost of accepting that power were to exceed rather than avoid utility capacity and energy costs.

An accurate assessment of qualifying facility development can only be achieved if we have a mechanism for more precisely determining when and whether a qualifying facility will become operational. The QFMP, while not required in the earlier stages of qualifying facility development, is now necessary for this Commission to make such a determination.

For this reason, not only we will require the presently affected qualifying facilities to comply with the QFMP screening criteria, but we will also consider making all of the QFMP [35] requirements part of all four

standard offers. To this end, we will direct the consolidation of A.82-04-44, et al. (Standard Offer 4) with A.82-03-26, et al. (Standard Offers 1, 2 and 3) for the purpose of intiating a comment procedure on the addition of the QFMP requirements to the standard offers. These comments should specifically address the inclusion of such screening criteria as proof of site control, development schedule, and project fee as conditions precedent to a qualifying facility signing a standard offer and the other milestones in the QFMP as conditions for maintaining the validity of the standard offer contract. These comments will be due no later than August 1, 1985.

We are interested in keeping the scope of the above inquiry as narrow as possible. This procedure should not be looked upon as a means of reexamining other standard offer terms. The sole purpose of the proceeding will be to

consider appropriate prerequisites for entering and conditions for maintaining a standard offer along the lines of the QFMP. The Commission will consider any specifically proposed contract language to effect this purpose as well as limitations on the response time of the utility in indicating compliance or noncompliance with the screening prerequisites.

Despite our recognition of the value of adding QFMP requirements to the standard offer, we wish to emphasize that the QFMP imposes currently effective screening criteria on qualifying facilities. Therefore, during the pendency of our comment procedure, we will direct each utility to notify every qualifying facility which seeks to sign any effective standard offer or negotiate a related agreement of the qualifying facility's current obligations under the QFMP.

Our preceding conclusions regarding the tendered agreements have, of course, been directed to those qualifying facilities who have signed standard offers. Still at issue are the status of those agreements signed before April 17 which contained nonstandard terms, [36] reflected an attempt to switch between standards offers, or related to the outcome of another proceeding (Cogeneration Services).

With respect to the nonstandard agreement based on interim Standard Offer 4, we believe that our approach discussed above for the standard offers is also reasonable for fully negotiated agreements. Such agreements have been the subject of three of the petitions for modification reviewed in this decision - Oakland Scavengers, Nove, and Combustion Engineering. In each case, the nonstandard terms had been accepted by both parties (the qualifying facility and PG&E) and an agreement embodying these terms had been completed and signed by the qualifying facility and

delivered to the utility before April 17. In these cases, the parties had achieved a "meeting of the minds" prior to the suspension of the interim standard offer. We will, therefore, authorize the utility to sign these agreements and any other negotiated agreement based on interim Standard Offer 4 which meets similar criteria - nonstandard terms accepted by both parties and an agreement embodying the accepted terms which has been fully executed by the qualifying facility and delivered or mailed to the utility before April 17. Our requirements regarding compliance with the QFMP in the manner described above will also be imposed on these projects.

Contract switching related to Standard Offer 4 was addressed in detail in D.83-09-054. Not only was switching from Standard Offer 4 prohibited, unless permitted by the contract or undertaken at the end of the contract term, but a similar rule was

announced for those seeking to switch to interim Standard Offer 4. (D.83-09-054, p. 17.) Under these circumstances, we believe that it is reasonable to adopt Public Staff's position that any switching related to Standard Offer 4 must meet the guidelines of D.83-09-054. To be effective the switch must therefore be one permitted under that order or the terms of the agreement and completed and signed by the qualifying facility, with delivery to the utility, before April 17. [37] Finally, we address two "special cases" - Cogeneration Services and Energy Distribution. PG&E suggests that the Cogeneration Services' projects are impeded by more than its petition for modification of D.84-08-037. Nevertheless, we find that our decision on the petition will answer the threshold question of the projects' eligibility for interconnection and the QFMP. Should Cogeneration Services be authorized to

participate in the QFMP, the projects will be required to comply with all standard offer and QFMP requirements as described above to become valid agreements with PG&E.

With respect to Energy Distribution, that party has alleged that it attempted to enter agreements with Edison in December 1984, but was thwarted by Edison's policy of requiring simultaneous signing of both interconnection and purchase power agreements. Edison denies this policy, but claims the agreements are not valid because of Energy Distribution's failure to meet the QFMP requirements. We note one major problem with Edison's argument - the QFMP requirements were not in effect when Energy Distribution first sought to contract with Edison. Further, Edison does not contest in any way Energy Distribution's assertion that it had provided all of the information required as of December 1984.

It is not clear from either Edison's or Energy Distribution's petitions whether actual agreements existed or were signed by Energy Distribution relating to its projects prior to January 1 or April 17, 1985. However, in light of Edison's sole complaint that Energy Distribution has failed to comply with the QFMP, we will include Energy Distribution in our order requiring execution of tendered standard offer agreements. We will require Energy Distribution, however, to meet the QFMP procedures, as in the case of all of the other qualifying facilities and petitioners, as previously specified in this decision.

[38] Findings of Fact

* * *

[44] 34. Interim Standard Offer 4 agreements tendered by Cogeneration Services, Inc. and Hydropool are impacted by the outcome of the Commission's decision on PG&E's petition for modification of D.84-08-037. The ability of

Cogeneration Services, Inc. and Hydropool to enter such agreements should therefore be determined by the decision in that proceeding.

* * *

Conclusions of Law

* * *

[47] 6. The status of any interim Standard Offer 4 agreements tendered by Cogeneration Services, Inc. and Hydropool to PG&E prior to April 17, 1985, shall be determined by the outcome of the Commission's decision on PG&E's petition for modification of D.84-08-037 in I.84-04-077.

* * *

86-686

No. _____

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDICES TO JURISDICTIONAL STATEMENT

VOLUME III (of 3 Volumes)
Appendix L through Y

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDICES TO JURISDICTIONAL STATEMENT

VOLUME III (of 3 Volumes)
Appendix L through Y

Original page numbers appear at bottom of pages and in [ ] throughout the text.

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

L/AM:mbh

Decision 86-02-033

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	)	I.84-04-077 (Filed April 18, 1984)

ORDER MODIFYING DECISION 85-09-058

AND DENYING REHEARING

An application for rehearing of Decision (D.) 85-09-058 has been filed by Cogeneration Services, Inc. and Hydropool (Hydropool). Pacific Gas & Electric Company (PG&E), San Diego Gas & Electric Company, and Southern California Edison Company have filed oppositions to the application. We have considered all of the allegations of error raised in this application and the responses in opposition thereto, and are of the opinion that sufficient grounds for granting rehearing

have not been shown. However, we will modify and clarify the decision as indicated below. Therefore,

IT IS ORDERED that D.85-09-058 is modified as follows:

1. The first two paragraphs under Section D on page 16 are deleted and the following language substituted:

> "The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling, incorporate it by reference herein, and grant PG&E's Petition to Modify D.85-08-37. We find after reviewing the [2] evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution.
>
> "We stated in D.85-06-163, the Orphan Contracts decision, that resolution of PG&E's Petition to Modify would determine that ability of Hydropool to enter Standard Offer 4 agreements with PG&E. Our decision to grant PG&E's Petition means, of course, that Hydropool does not have the ability to enter Standard Offer 4 agreements under the terms of the interim solution,

as long as its interconnection is through the Intertie. We note that we need not reach the issue of whether Hydropool's Standard Offer 4 tenders complied with all requirements prior to our having prospectively suspended Standard Offer 4.

"We stress that this decision does not determine access to the Intertie. No one has declared that Hydropool cannot use the Interie to deliver power to PG&E. The dispute is one over the price which must be paid for that power. The evidence in this case supports our decision, made in response to a documented, critical but temporary situation of transmission of system constraints, not to make Standard Offer 4 prices available to any QF interconnecting with the Intertie. The record nowhere indicates and, in fact, contradicts any notion that either the Commission, the Commission staff, the respondent utilities, or any QF ever contemplated that our Standard Offers applied to such interconnection, particularly in such circumstances. We do not know whether the institutionalized avoided cost of Standard Offer 4 is appropriate for a situation where, because of the Intertie interconnection, a QF's power of necessity will always displace economy power from the Northwest whenever such power is available to fill PG&E's capacity entitlement. We do not believe PURPA requires such a result, without convincing

evidence that PG&E's avoided cost in such a situation is indeed equivalent to [3] the Standard Offer 4 price.

"Finally, we do not reach the larger question of whether, and if so, under what conditions, QFs ever should have access to the Intertie under the Standard Offer type of option. Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. Issues to be addressed in that proceeding will include, but will not be limited to:"

2. New Finding 8a is added to read:

"D.85-06-163 stated that resolution of PG&E's Petition to Modify the interim solution by excluding the Intertie would determine the ability of Hydropool to enter Standard Offer 4 agreements with PG&E."

3. New Conclusion 3a is added to read:

"PG&E's Petition to Modify D.84-08-037 to exclude the Intertie from the terms of the interim solution should be granted."

4. New Conclusion 3b is added to read:

"Granting PG&E's Petition to Modify will have the effect of determining that Hydropool does not have the

> ability to tender Standard Offer 4 contracts to PG&E under the terms of the interim solution, but will not have the effect of excluding Hydropool from the Intertie under some other pricing arrangement."

[4] IT IS FURTHER ORDERED that rehearing of D.85-09-058, as modified above, is hereby denied.

This order is effective today. Dated February 5, 1986, at San Francisco, California

DONALD VIAL
President

VISTOR CALVO
FREDERICK R. DUDA
Commissioners

Commissioner Priscilla C. Grow, being necessarily absent, did not participate.

I dissent.

WILLIAM T. BAGLEY, Commissioner

ALJ/SM/TCG

OPINION ON PETITION FOR MODIFICATION BY RENEWABLE ENERGY VENTURES, INC.

On August 2, 1985, Renewable Energy Ventures, Inc. (REV) filed a petition for modification of Decision (D.) 85-06-163.

* * *

[2] As explained in D.85-06-163, for a QF to have secured a valid contract based on interim Standard Offer 4 prior to its suspension, the QF must have completed and signed such an agreement with delivery to the utility before April 17, 1985. Compliance with the Qualifying Facility Milestone Procedure (QFMP) within 60 days of the effective date of D.85-06-163 (June 21, 1985) was also required.

By its petition, REV seeks the modification of D.85-06-163 to permit Southern California Edison Company (Edison) to execute power purchase agreements based on interim Standard Offer 4 for REV's three planned wind

parks. Edison has not responded to REV's petition.

* * *

[3] According to REV, in D.85-06-163 the Commission found Energy Distribution to be a "special case" and entitled to a purchase power agreement with Edison based on interim Standard Offer 4 even though the criteria specified in that [4] order for securing such agreements had not been fully met by Energy Distribution.

Specifically, REV notes the Commission's conclusion that Energy Distribution's failure to comply with the QFMP was an insufficient reason for Edison to refuse to execute a Standard Offer 4 agreement once Energy Distribution had indicated its acceptance of the standard offer. REV asserts that the Commission's findings with respect to Energy Distribution were made "irrespective of

whether actual agreements existed or were signed by Energy Distribution".

REV acknowledges that it had not literally executed an interim Standard Offer 4 agreement and tendered it to Edison before April 17, 1984. REV states, however, that the course of action which it did take in good faith was certainly one which should have lead to the same result--an executed purchase power agreement based on interim Standard Offer 4.

* * *

[7] The facts cited by REV in its petition suggest that it is in fact similarly situated to Energy Distribution. We note that Edison has chosen not to respond to REV's petition. Edison has therefore not contested REV's assertion that REV had indicated to Edison its desire to execute an interim Standard Offer 4 purchase power agreement for its three projects and provided all information necessary to that end prior to April 17,

1985. Further, it appears that REV, unlike Energy Distribution, had in fact complied with the QFMP project definition and site control requirements before that date.

We therefore conclude that Edison should be directed to execute purchase power agreements based on interim Standard Offer 4 for the three wind projects identified in REV's petition. This conclusion, however, does not require any modification of D.85-06-163. The principles announced in that decision remain unchanged. Instead, our conclusion, as discussed above, is based upon the finding that REV is similarly situated to Energy Distribution whose factual circumstances entitled Energy Distribution to the same treatment as other qualifying facilities submitting signed interim Standard Offer 4 agreements to the utility prior to April 17, 1985.

* * *

[9] ORDER

IT IS ORDERED THAT:

1. Southern California Edison Company (Edison) shall execute purchase power agreements based on interim Standard Offer 4 for the three wind projects identified in the petition of Renewable Energy Ventures Inc. (REV) for modification of D.85-06-163. These wind projects are the Buck Wind Park "Addition D", the Cahuilla Wind Park, and the Oasis Wind Park. REV shall be required to meet all criteria [10] established in D.85-06-163 for execution of the purchase power agreements based on interim Standard Offer 4.

* * *

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	)	OII 84-04-077

PETITION FOR MODIFICATION OF DECISION

NO. 84-04-037

[AS AMENDED]

Pursuant to Rule 43 of the Commission's Rules of Practice and Procedure Pacific Gas and Electric Company ("PGandE" or "Company"), and the Independent Energy Producers ("IEP") hereby submit this Petition for modification of Decision No. 84-08-037.

On August 1, 1984, the California Public Utilities Commission ("CPUC" or "commission") issued Decision No. 84-08-037, approving with only slight modifications the Stipulation and Order agreed to by Pacific Gas and Electric

Company, the Commission Staff, and Independent Energy [2] Producers. Most of the modifications were minor and uncontested. However, the Commission did make one modification, which if unclarified, could have serious and unintended consequences. This modification was to open the interim solution to Qualifying Facilities ("QFs") outside of the PGandE service territory without specifically stating that those QFs not be permitted to deliver power to PGandE into the 500 kV system north of Round Mountain Substation. PGandE and IEP seek modification of the Order to clarify that connection of out of area QFs must be to an area line.

On April 18, 1984 the CPUC issued OII 84-04-077, investigating transmission constraints and the ability of electric utilities to accept QF power. After a prehearing conference on June 22, PGandE, the Commission Staff, and IEP prepared a stipulation to permit QF development to continue. On July 5, 1984, the proposed

interim solution was mailed to parties on the service list of this proceeding and two OIR 2 proceedings; recipients were given until July 13 to file comments and those comments were discussed at a prehearing conference held in San Francisco on July 17, 1984. Two parties submitting comments, Cogeneration Services and California Energy Company, urged that the interim solution be available to QFs outside the PGandE service territory. The signatories to the stipulation unanimously opposed this change. To the limited extent that this issue could be [3] explored in a prehearing conference, PGandE and Staff pointed out that including those QFs would change the possible costs associated with the interim solution.

The Commission recognized the economic consequences of QFs out of the service territory displacing economy energy under the interim solution, and it proposed to limit those consequences by restricting to 990 the number of MW that could be connected under the interim solution. We believe the commission

never intended to permit QF use of the Intertie under the interim solution, but the Order is not clear on this point.

Moreover, the parties who negotiated the interim solution never intended it to apply to interconnection with the Pacific Northwest-Pacific Southwest 500kV intertie. In discussion during the publicly held workshops, the participants recognized that such an interconnection could result in displacement of low cost economy energy from the Pacific Northwest on a one-to-one basis. QF access to the Intertie was felt to be a policy question with broad implications which requires careful study and is inappropriate for inclusion in an interim order.

Furthermore, the interim solution commits PGandE to upgrading bulk and area transmission lines in order to accommodate additional QF power, thus ensuring that the upgrades proceed as expeditiously as possible. This commitment to build guarantees that any diseconomies in [4] operations in order to take additional QF

power would be purely interim, with an expected duration of no more than 5-8 years.

The situation on the Intertie is entirely different. Nothing in the interim solution addresses upgrades on the Intertie north of Round Mountain. Therefore, the economic consequences of permitting QFs on the Intertie under the interim solution would occur for the entire length of the QFs' contract. In sum, allowing QFs on the Intertie pursuant to the interim solution is totally contrary to the spirit of the document; it leaves that aspect unbalanced and without a solution. Clearly this result was unintended by the parties, and in all likelihood, by the Commission. While QFs are not precluded from access to the Intertie, such access is subject to negotiation and is not appropriate to the interim solution.

Finally, the stipulation as drafted did not limit the total number of MW that could be accommodated under the interim solution. If the Commission wants to specify such a limit,

the total number should be 1150 MW (rather than 990) to reflect the capacity added by the bulk upgrades. The total MW for each area line should remain as in Ordering Paragraph 10 (as corrected by Decision No. 84-08-037), but changing the total to 1150 will permit additional QF development on lines which are affected primarily by bulk constraints.

[5] CONCLUSION

Consistent with the analysis presented at pages 8-9 of Decision No. 84-08-037, that decision should be modified to add the following finding of fact and ordering paragraph:

FINDING OF FACT:

10. Because of its broad policy implications, a decision setting forth conditions for interconnection of QF's with the Pacific Northwest-Pacific Southwest 500kV intertie is inappropriate for inclusion in the interim solution.

ORDERING PARAGRAPH:

1.b The interim solution will not apply to QFs located outside of PGandE's service territory whose output would flow on the Pacific Northwest-Pacific Southwest 500 kV Intertie north of Round Mountain Substation.

In addition, the decision should be modified to reflect the fact that while the total area capacity under the interim solution should remain at 990, the total MW of QF development that may be interconnected is 1150. In Finding of Fact 9 and Ordering Paragraph 1.b, the number 990 should be changed to 1150.

[6]

Respectfully submitted,

/s/ Michael S. Hindus
Michael S. Hindus

Attorney for Pacific Gas and Electric Company
77 Beale Street
San Francisco, CA 94106

Respectfully submitted,

/s/ Janice G. Hamrin, Ph.D.
Janice G. Hamrin, Ph.D.
Executive Director
Independent Energy Producer
1225 8th Street, Suite 285
Sacramento, CA 95814

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	)	I.84-04-077 (Filed April 18, 1984)

ADMINISTRATIVE LAW JUDGE'S RULING

Introduction

On April 12, 1985, counsel for Pacific Gas and Electric Company (PG&E) moved to dismiss the proceeding insofar as it involved the right of Hydropool - Cogeneration Services, Inc. (Hydropool) to interconnect to the pacific Northwest - Pacific Southwest 500 Kv Intertie (Intertie). San Diego Gas and Electric Company (SDG&E) and the Commission's Public Staff Division (staff) moved to strike the evidence offered by Hydropool.

The Commission in Decision (D.) 84-11-123 granted a limited rehearing on the question of Qualifying Facility (QF) interconnection to the Intertie under the terms of an interim solution for transmission constraints in PG&E's service territory. Hearings were held on December 17, 1984, March 28-29, 1985, April 9, 10, and 12, 1985. John E. Kerler, Supervising Power System Engineer, testified on behalf of PG&E. Dennis E. Peseau, Senior Vice President and Senior Economist of Zinder Companies, Inc., Robert K. Weatherwax, Jr., President of Sierra Energy and Risk Assessment, Inc., and Ivan Gold, President of Cogeneration Services, Inc. and managing partner of Hydropool, all testified on behalf of Hydropool. Further hearings were suspended until a ruling is issued on the motions.
[2] PG&E, other utilities, and staff have argued that the intent of the signatories to the interim solution is the only relevant factor. They intended to exclude the Intertie from the interim solution. Accordingly, they

assert Hydropool or any other QF has no right to interconnect to the Intertie under the terms of the interim solution.

PG&E's witness Kerler explained why PG&E has excluded the Intertie from the interim solution. Kerler testified that at the time the interim solution was drafted, PG&E believed no firm capacity on the Intertie would be available for QFs. If QFs were allowed to interconnect to the Intertie, PG&E believed that the QFs would displace cheaper economy power from the Northwest.

PG&E asserts that the QFs which are allowed to interconnect to constrained bulk or area lines under the interim stipulation will cause only temporary operating diseconomies since transmission upgrades have been identified for those lines. Thus, PG&E agreed to allow QF interconnection to those lines because the company believes the lines'

capacity can be increased and the diseconomies will end.

PG&E's evaluation of the Intertie is quite different. PG&E has never believed that firm capacity on the Intertie will be available. Consequently, the company consistently has refused to give QFs any access to the Intertie.

Hydropool responded to PG&E's showing by attempting to show that excess capacity will be available on the Intertie and that other QFs could cause displacement of Northwest economy power.

Hydropool's witness Peseau testified that firm surplus resources in the Northwest and very favorable water conditions have resulted in high utilization of the Intertie in the last four years. [3] Peseau asserted that the Northwest's large surplus should diminish and average water conditions should return in the future. He concluded that the declining firm

surplus with average water conditions should not fill the expanding capacity of the Intertie.

Hydropool's witness Weatherwax examined PG&E's long range plans and determined that PG&E should not use all of its Intertie capacity over the course of any year for the next 20 years. Weatherwax stated that if Hydropool is permitted to interconnect its projects to the Intertie there will not be a one-to-one displacement of Northwest economy power. In addition, Weatherwax testified that other QF projects may cause displacement of Northwest economy power during minimum load conditions. Thus, Weatherwax asserts Hydropool is similar to other QF projects in its impact on the PG&E transmission system.

Hydropool's witness Gold testified that the only economic market for the Hydropool projects is in California and the Intertie is the only transmission path for these projects.

Without Commission approval, Gold stated that Hydropool's projects will not be built.

PG&E Motion to Dismiss

PG&E raises several grounds for dismissing Hydropool's claim in this proceeding. PG&E argues that Hydropool is not entitled to a QF contract, that Hydropool's marketing agreements are not legal under PURPA, and that Hydropool has failed to comply with Decision (D.) 84-08-037. In addition, PG&E maintains that no unlawful discrimination has been shown by Hydropool.

PG&E asserts that since Hydropool is not the owner or operator of its cogeneration and small power production facilities, Hydropool is not a QF under PURPA. PG&E points out that Hydropool is a broker or agent for QFs as it owns only a de minimis 2.5% holding in one facility.

[4] Furthermore, PG&E claims Hydropool even lacked authority to execute power purchase

agreements on behalf of the developers. PG&E asserts that Hydropool's marketing agreements with developers provide that Hydropool is merely to deliver power purchase agreements to the developer for the developer's execution.

PG&E submits that Hydropool is a broker for power and is not a QF. Accordingly, PG&E believes Hydropool's claim should be dismissed.

PG&E next argues that Hydropool's marketing agreements provide for deliveries of utility power at QF prices. The marketing agreements contain "shaping" provisions which permit substitution of a "shaping" utility's power for the QF's generation. PG&E submits that this "shaping" substitution clearly violates PURPA.

PG&E argues that Hydropool has not complied with the interim solution as approved by the Commission in D.84-08-037. The interim solution provided that priority rights for each transmission allocation are not trans-

ferable between projects. PG&E points out that only seven of the fourteen projects mentioned by Hydropool to PG&E in August, 1984, are still being pursued. PG&E asserts Hydropool has substituted other projects for some of the original projects in violation of D.84-08-037.

Finally, PG&E submits that no discrimination has been shown by Hydropool since no QF has been allowed by PG&E to deliver over the Intertie. PG&E points out that Hydropool was offered an opportunity to deliver power on a radial line to a PG&E area transmission line. Furthermore, PG&E claims that it has denied the request of another QF to interconnect to the Intertie. Thus, PG&E concludes that Hydropool has been treated in the same manner as other QFs.

Hydropool Response

Hydropool asks the Commission to deny PG&E's motion for several reasons.

[5] First, Hydropool asserts that PG&E failed

to make its motion upon five days written notice as required by Rule 56. Hydropool claims PG&E has known of Hydropool's agency relationship with its projects as early as November, 1984. Therefore, Hydropool argues PG&E's motion is improper and should be denied.

Hydropool also asserts that it was expressly authorized to act as agent for QF project owners. Hydropool claims that the owners verbally authorized its agency authority and subsequently ratified Hydropool's actions.

Hydropool points out that it has never received a transmission allocation under the interim solution since PG&E consistently has denied all requests for interconnection to the Intertie. Therefore, Hydropool submits it has not improperly shifted an allocation between projects.

Finally, Hydropool maintains that all QFs participating in the interim solution may cause displacement of Northwest economy

power. Thus, Hydropool asserts that the seasonal displacement of Northwest economy power is not a valid basis for excluding only Hydropool's projects from the interim solution.

SDG&E and Staff Motion to Strike

SDG&E moved to exclude the testimony of Hydropool witnesses Peseau and Weatherwax. Counsel for SDG&E argues that the interim solution rationally differentiates between classes of QFs. He asserts the Intertie is significantly different from the rest of PG&E's transmission system and is properly excluded from the interim solution. To SDG&E, interconnection to the Intertie is a price issue which should be addressed in another proceeding.

Staff joined SDG&E in moving to strike the testimony of Peseau and Weatherwax. Staff believes the only relevant issue is the intent of the interim solution. Staff further argues that Hydropool's witnesses have not shown that

one-to-one displacement of economy power will not occur if its projects interconnect to the Intertie.

[6] Discussion

The purpose of the interim solution was to enable QFs in PG&E's constrained northern transmission system to proceed with their projects until these constraints are relieved by transmission upgrades and new transmission lines. The terms of the interim solution were limited to QFs located within PG&E's service territory. The Commission in D.84-08-037 removed the in-service area restriction and stated: "At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries."

PG&E immediately filed a petition for modification of D.84-08-037 asserting that it intended to exclude the Intertie from the

interim solution because interconnection to the Intertie could result in one-to-one displacement of economy power. PG&E also asserted that this displacement would not be relieved by planned transmission upgrades or new transmission lines. PG&E then asked the Commission to exclude the Intertie from the interim solution as a matter of policy.

The Commission declined to exclude the Intertie from the interim solution and instead ordered a limited rehearing on this matter. (See D.84-11-123.)

The issue addressed in the limited rehearing is whether PG&E's proposed exclusion of the Intertie from the interim solution is a reasonable distinction among its constrained transmission lines or unlawful discrimination against a class of QFs.

The California Supreme Court in United States Steel Corp. v Public Utilities Commission, 29 Cal. 3d 603 (1981) set forth

some guidelines for the Commission's determinations on claims of discrimination. The Court affirmed the Commission's wide discretion in prescribing economic classifications but stated that mere administrative inconvenience may not justify an imprecise [7] classification. The Court observed that the Commission's finding of administrative "difficulty" to support a rate exemption was inadequately supported by record evidence. (29 Cal. 3d at 614.) Here it is unlikely that the mere declaration of the signatories' intent would be considered a sufficient basis for the exclusion of one transmission line and QFs in proximity to that line from the interim solution.

The record for this proceeding now contains sufficient evidence for a Commission finding. Prior to hearing, the Commission lacked any evidence apart from a PG&E petition alleging that permanent one-to-one displacement

of economy power could result from QF interconnection to the Intertie. At hearing, PG&E was required to present a witness to substantiate its claim. Hydropool was permitted to cross-examine and was given an opportunity to present rebuttal witnesses. In addition, PG&E stated it wants to present additional evidence should the Commission find that its initial presentation is lacking.

The salient facts developed in the record are as follows.

In recent years, PG&E's capacity entitlement on the Intertie was fully utilized due to above average hydro conditions. Based on this recent experience, the company may predict that all of its capacity on the Intertie could be used in the next few years. Assumption of average hydro conditions would lead to a different conclusion, i.e., capacity will be available most of the year. However, at times such as during the spring run-off

months, the Intertie will be fully used even under average hydro conditions. If allowed to interconnect, Hydropool's projects will displace economy power at these times.

The QFs allowed to interconnect to other constrained transmission lines also may cause displacement of economy power on the Intertie. Under minimum load conditions, surplus area generation may be transmitted from the northern area to the Bay Area over the [8] Intertie. To the extent QF deliveries in the northern area cause a resource-load imbalance, these QFs may displace economy power deliveries over the Intertie if other PG&E resources are not curtailed.

PG&E has claimed that the operating diseconomies expected under the interim solution are temporary. However, the transmission upgrades associated with the interim solution will not relieve a capacity constraint on the Intertie. Thus, the

diseconomy of Intertie back-offs may continue after these upgrades are completed.

PG&E never has allocated firm capacity on the Intertie to a QF. PG&E instead has offered to purchase QF power delivered on the Intertie on an interruptible basis or at prices competitive with economy power.

From these facts, one may find a few differences between QF interconnection to the Intertie and to other constrained transmission lines. First, direct interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PG&E's capacity entitlement. Interconnection to other transmission lines will cause displacement only when such economy power is available and uncurtailed area generation exceeds area load. Consequently, the amount of displacement from QF interconnection to the Intertie may exceed any Intertie back-off caused by other QF interconnection to other

lines. Second, direct interconnection will reduce PG&E's available firm capacity on the Intertie in its negotiations of long term capacity contracts in the Northwest. Other QF interconnections to other lines will not alter PG&E's negotiating posture. Third, PG&E never has represented to QFs that it would accept firm QF deliveries on the Intertie without price concessions. On the other hand, until PG&E's discovery of unforeseen constraints in its northern transmission system, PG&E expected QF interconnection to other transmission lines to occur under the various approved standard offers in the ordinary course of business. Thus, there is a basis for distinguishing the Intertie from other constrained transmission lines.

[9] Ruling

The objective of this proceeding and the interim solution has been to allow QF development to proceed despite the unforeseen

transmission constraints in PG&E's northern transmission system. This objective has been reasonably met by the interim solution without unlawful discrimination against a class of QFs. No further hearings are required on the issue of QF interconnection to the Intertie under the terms of the interim solution. The Commission may modify D.84-08-037 to exclude the Intertie from the interim solution as requested in PG&E's petition for modification. Alternatively, the Commission may deny PG&E's petition and allow Hydropool to participate in the interim solution as a matter of policy.

The various motions to strike or exclude Hydropool's evidence are denied as the Commission should issue a decision based on findings drawn from this evidentiary record. PG&E's objections to Hydropool's standing as a QF will be addressed if the Commission should find that QFs should be allowed to interconnect

to the Intertie under the terms of the interim solution.

Dated July 30, 1985, at San Francisco, California.

/s/ RANDOLPH L. WU
Randolph L. Wu
Administrative Law Judge

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

INVESTIGATION ON THE COMMIS-)	OII No.
SIONS OWN ON MOTION INTO THE)	84-04-077
TRANSMISSION SYSTEM OPERATIONS)	DECISION
OF CERTAIN CALIFORNIA ELECTRIC)	85-09-058
CORPORATIONS REGARDING TRANS-)	
MISSION CONSTRAINTS ON COGEN-)	
ERATION AND SMALL POWER)	
PRODUCTION DEVELOPMENT)	
)	

PETITION OF HYDROPOOL AND
COGENERATION SERVICES, INC.
FOR REHEARING OF DECISION NO. 85-09-058

Date: October 18, 1985

PETTIT & MARTIN
EDWARD B. LOZOWICKI
MICHAEL J.F. SMITH
333 West Santa Clara St.
10th Floor
San Jose, California 95113
Telephone: (408) 295-3210
Attorneys for Cogeneration
Services, Inc. and
HydroPool, Interested
Parties

[2] I. PRELIMINARY STATEMENT

Cogeneration Services, Inc. and HydroPool, interested parties, (collectively, "HydroPool") hereby petition this commission

for rehearing and reconsideration of Decision 85-09-058 issued September 18, 1985 (hereinafter, "the Decision"). In particular, HydroPool challenges those portions of the Decision and order which exclude the Northwest Intertie from the so-called "Interim Solution." (See typed Decision p.16 et seq.) These provisions effectively bar HydroPool's out-of-state QFs from interconnecting on an interstate transmission line; and retroactively deny them contractual rights under valid Standard Offer 4 contracts.

By excluding HydroPool's out-of-state projects from the "Interim Solution," the Decision violates the interstate commerce and equal protection clauses of the United States Constitution. It also discriminates against HydroPool projects in violation of the Public Utilities Regulatory Policies Act of 1978 (PURPA), and the Public Utilities Code; and exceeds the Public Utilities Commission's

jurisdiction by excessively interfering with interstate commerce. Furthermore, by effectively depriving HydroPool of the benefit of its Standard Offer 4 contracts, the Decision violates the contract and due process clauses of the United States Constitution, and deprives HydroPool of its right to sell power to PG&E under PURPA and FERC regulations promulgated in accordance with PURPA. These are primarily legal issues that can be decided in a modification or limited rehearing at this time. There is no justification for deferring HydroPool's projects to a new generic proceeding, [3] and no new evidentiary hearings are required. HydroPool projects are not in the same position as other out-of-state QFs because HydroPool has fourteen valid Standard Offer 4 contracts and has acted in a timely fashion to preserve its rights to transmission capacity. It should be included in the Interim Solution. Deferring

adjudication of HydroPool's case to be decided in another proceeding involving only out-of-state QFs is discriminatory in itself and may unreasonably defer adjudication of HydroPool's rights until HydroPool is forced out of business by regulatory delay.

II. GROUNDS FOR PETITION

Pursuant to Public Utilities Code § 1732, and Rules of Practice No. 86.1, HydroPool submits the following grounds for reconsideration and rehearing of Decision 85-09-058:

1. The Decision openly excludes out-of-state QFs from the northern California market and thereby unlawfully burdens interstate commerce in violation of the United States Constitution. U.S. CONST., Art. I, §8(3).

2. The Decision invalidates HydroPool's Standard Offer 4 contracts, retroactively altering the obligations of private contract

in violation of the United States Constitution. U.S. CONST., Art. I, §10(1).

3. The Decision's exclusion of HydroPool's out-of-state QFs from the northern California power market denies HydroPool and HydroPool's projects equal protection of the law in violation of the United States Constitution. U.S. CONST., Amend. XIV, §1.

[4] 4. The Decision's exclusion of HydroPool's out-of-state QFs is unlawfully discriminatory because no evidence supports a rational distinction between HydroPool and other QFs that deliver power over the Intertie south of Round Mountain. Cal. Pub. Util. Code §728, 16 USC § 824a-3(b)(2).

5. The Decision is void for want of jurisdiction because it burdens HydroPool's access to an interstate transmission line, an act in excess of the Commission's statutory regulatory authority. Cal. Pub. Util. Code §202.

APPENDIX P, ORIG. PGS. 3, 4

6. The Decision unreasonably defers adjudication of HydroPool's rights by transferring HydroPool's claims into yet another generic regulatory proceeding. This repeated delay is a failure by the PUC to implement PURPA in violation of 18 CFR 292.401.

7. The Decision does not adequately consider the anticompetitive impact of denying out-of-state QFs access to the northern California market, and of perpetuating PG&E's oligopolistic control of sales and wheeling over the Intertie.

8. Finding of Fact No. 9 is not supported by evidence because the evidence shows no more displacement of economy power on the Intertie by HydroPool QFs than by other QFs included in the "Interim Solution."

9. Finding of Fact No. 9 is not supported by the evidence because there was no evidence on the record of QF impact on PG&E's

negotiations for power purchases on the Intertie.

10. Finding of Fact No. 9 is not supported by relevant material evidence because evidence on the record of [5] PG&E's prior unlawful discrimination does not make its present discrimination lawful.

11. Conclusions of Law Nos. 3 and 4 are not supported by the findings or the evidence.

12. The Decision does not contain adequate findings to justify the denial of HydroPool's valid Standard Offer 4 contracts.

13. The Decision does not contain adequate findings to justify exclusion of HydroPool's QFs from the "Interim Solution."

14. The Decision does not contain adequate findings to justify the burden imposed on interstate commerce, the discriminatory classification of in-state versus out-of-state QFs, and other disparate

effects recited above, which result from excluding out-of-state QFs from the Intertie.

III. SUMMARY OF PROCEDURAL BACKGROUND AND FACTS

In April, 1984, the Commission began an investigation into transmission limitations on the PG&E system which may constrain QF development in California (OII 84-04-077, hereafter "constraints case"). PG&E alleged that such limitations exist on its northern bulk and area transmission systems, including the Northwest Intertie line. To accommodate a limited amount of QF development, PG&E and other parties proposed an interim order which authorized: 1,150 MW (originally 990 MW) of new QF interconnections in the northern area; capacity upgrades on selected transmission lines; and uneconomic dispatch to accommodate the new QF power while the upgrades were built.

* * *

Civil No. SF 24966

IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA

COGENERATION SERVICES, INC., and Oregon corporation, and HYDROPOOL, a general partnership, Petitioners,	)
vs.	)
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent,	)
[Pacific Gas & Electric Co., Real Party in Interest]	)

Petition for Writ of Review and Points and Authorities in Support Thereof

NEYHART, ANDERSON, NUSSBAUM, REILLY & FREITAS
JOSEPH FREITAS, JR.
100 Bush Street, #2600
San Francisco, California 94104
Telephone: (415) 495-4949

NOSSAMAN, GUNTHER, KNOX & ELLIOTT
JOHN T. KNOX
100 Embarcadero, Third Floor
San Francisco, California 94105
Telephone: (415) 543-2700

PETTIT & MARTIN
EDWARD B. LOZOWICKI
MICHAEL J. F. SMITH
333 West Santa Clara Street
10th Floor
San Jose, California 95113
Telephone: (408) 295-3210
Attorneys for Cogeneration Services, Inc. and HydroPool, Interested Parties

APPENDIX Q

Table of Contents

		Page
I.	INTRODUCTION	2
II.	PORTIONS OF THE OPPOSITION BRIEFS SHOULD BE STRICKEN BECAUSE THEY RELY ON MATTERS NOT IN THE RECORD ON REVIEW	3
	A. The PUC's Belated Decision On Rehearing is Void Because It Conflicts With Statutory Procedure; Therefore It Should Not Be Considered Part of the Record	3
	B. The PG&E Letter to ALJ WU Was Not An Exhibit or Testimony, and Therefore Not Part of the Record	5
	C. PG&E's Offer to Compromise Is Inadmissible And Should Not Be Considered Part of Record	6
III.	THE DECISION IS RIPE FOR REVIEW	6
IV.	THE PARTIES CONCEDE THAT THE PUC CANNOT EXCLUDE THE FOURTEEN HYDROPOOL PROJECTS FROM INTERCONNECTING WITH AND SELLING POWER TO PG&E ON THE NORTHWEST INTERTIES: ALTERNATELY, SUCH AN EXCLUSION WOULD UNLAWFULLY BURDEN INTERSTATE COMMERCE AND BE OUTSIDE THE PUC'S JURISDICTION.	8
	A. Respondent and Real Party Concede that PG&E is Obligated to Interconnect with the Purchase from QF's Wheeling Power to the Intertie	8

B. Alternately, Excluding Out-Of-State QFs From the Interim Solution Would Unlawfully Burden Interstate Commerce Because It Is the Only Practical Interstate Access to the California Power Market 9

C. Contrary to PG&E's arguments the burden on interstate commerce caused by exclusion of the out-of-state projects is clearly excessive when weighed against local benefits 12

V. CONTRARY TO RESPONDENT'S ARGUMENT, THE CONTRACTS TENDERED BY HYDROPOOL WERE AUTHORIZED BY THEN-APPLICABLE COMMISSION DECISIONS, AND VALID AS A MATTER OF CONTRACT LAW; THEREFORE, IRRESPECTIVE OF THE COMMISSION'S POWER TO SET CONTRACT TERMS PROSPECTIVELY, IT MAY NOT ABROGATE THE CONTRACTS RETROACTIVELY WITHOUT VIOLATING THE CONTRACT CLAUSE 14

A. The PUC Had Previously Made Standard Offer Contracts Available to QF's Outside The Utility's Service Area, Irrespective of Displaced Economy Power Or Delivery To Bulk Transmission Lines Like the Intertie. 14

B. By Signing And Tendering The Fourteen Standard Offers to PG&E, Binding Contracts Were Formed As A Matter Of Law; And Decision 85-06-163 Is Not Res Judicata On The Issue. 16

C. On The Facts Of This Case The PUC May Not Retroactively Abrogate Valid Power Contracts Between PG&E and HydroPool. 20

D. The PUC's Authority To Prospectively Adopt Different Prices for QFs Is Not Ripe For Review Because It Is. 21

VI. THE DECISION'S DISCRIMINATION AGAINST HYDROPOOL AS AN OUT-OF-STATE QF IS NOT SUPPORTED BY A RATIONAL BASIS. 21

VII. Conclusion

APPENDIX Q

PETTIT & MARTIN
EDWARD B. LOZOWICKI
333 W. Santa Clara St.
San Jose, CA 95113
(408) 295-3210

(Endorsed Filed
October 15, 1986)

SUPREME COURT
OF THE STATE OF CALIFORNIA

COGENERATION SERVICES, INC., and HYDROPOOL, Petitioners, vs. PUBLIC UTILITIES COMMISSION, Respondent, PACIFIC GAS & ELECTRIC COMPANY, Real Party in Interest.	S.F. No. 24966 Notice of Appeal

Petitioners Hydropool and Cogeneration Services, Inc., hereby appeal to the United States Supreme Court, pursuant to the provisions of 28 U.S.C. § 1257(2), from the order and judgment entered herein on July 30, 1986, denying their petition for a writ of review.

Dated Ocotober 15, 1986

Respectfully submitted,
PETTIT & MARTIN

By /s/JEH
Attorneys for Petitioners

APPENDIX R

Prepared Sworn Testimony of Ivan Gold
Before the California PUC

Exhibit No. 12

[2]

(Q1) Please state your name, business address and occupation.

(A1) My name is Ivan Lewis Gold and my business address is 2539 Larkin Street, San Francisco, California. I am President of Cogeneration Services, Inc., and as President, I am a managing partner of the HydroPool Partnership.

(Q2) What is HydroPool?

(A2) HydroPool is a partnership of three companies, Cogeneration Services, Inc., Interalfa, Inc. of Greenwich, Connecticut, and Tornet, Inc. of New York. HydroPool is

involved in the development of hydroelectric and alternative energy projects around the United States. These include several small power producers which plan to sell their firm capacity and energy to Pacific Gas & Electric Company ("PG&E") from plants in Oregon and Washington.

(Q3) Please summarize your educational background
and professional experience.

(A3) I received my bachelor's degree from the University of Pittsburgh in 1968, and my law degree from New York University Law School in 1971. Thereafter, I was law clerk to Chief United States District Judge Gus J. Solomon of Oregon in Portland, Oregon. From 1972 to 1975, I was an associate attorney with the Portland, Oregon law firm of Rives, Bonyhadi & Hall where I worked on public utility matters, primarily for electric and gas utilities. In 1975, I was appointed Deputy Public Utility Commissioner of Oregon, a post I held for eighteen months. In 1977, I served as special

consultant to the Chairman of the [3] Civil Aeronautics Board, regarding the impact of deregulation on the airline industry. In 1978, I returned to Portland, Oregon, as associate and then partner in the Portland law firm of Lindsay, Hart, Neil & Weigler. At that firm, I represented industrial customers of utilities in proceedings before the Bonneville Power Administration, and, later, cogenerators and small power producers. In 1980, one of my clients, Windfarms, Ltd., asked me to join them in San Francisco. I was with Windfarms, Ltd. as Vice President until 1982, responsible for project development and for negotiating contracts with public utilities. After leaving Windfarms, I continued to work on the development of cogeneration, hydroelectric and wind projects at Cogeneration Services, Inc., which I organized in 1979.

(Q4) Have Cogeneration Services, Inc. and HydroPool previously participated in QF cases before the Commission?

(A4) Yes. We have actively participated in the deliberations regarding the "Interim Solution" in this proceeding; have attended several workshops; and filed comments with respect to the Interconnection Priority Procedure. In addition, Cogeneration Services has appeared in the Long-Run Pricing case, Application 82-04-044, now pending before the Commission; and has filed comments in that case. We have been actively involved in soliciting Standard Offer 4 contracts from PG&E on behalf on HydroPool's Northwest Projects, which are involved in this proceeding; and other projects inside PG&E's service territory.

(Q5) What is the purpose of your testimony in this proceeding?

[4]

(A5) The purpose of my testimony is to show that HydroPool has relied on the Commission's prior decisions and policies with respect to QF development by investing work and money in its Northwest Project; that HydroPool has

relied on prior statements from PG&E regarding their willingness to interconnect HydroPool's projects to the Pacific Northwest Intertie; and to demonstrate that, without approval for such interconnection, HydroPool's projects will suffer irreparable injury.

(Q6) Please describe the nature and status of HydroPool's northwest projects.

(A6) HydroPool owns, has an option to acquire, and/or is marketing the output of several hydroelectric and cogeneration projects in Oregon and Washington. Each of these projects is a qualifying facility, as defined by regulations of the Federal Energy Regulatory Commission, and, where necessary, has secured a permit, license, or certification order from FERC or the appropriate government agency. The projects have ranged in capacity from .5 to 33 megawatts and use either falling water or boiler steam as an energy source. Some of the cogeneration projects are currently operational. The other projects, including

all the hydroelectric projects, are at various stages of development. The proposed date of initial deliveries to PG&E from each project varies from early 1986 to early 1989. Thus far, HydroPool and other project owners have invested $631,500 in developing the projects which are not yet operational.

(Q7) How would the northwest projects deliver power to PG&E?

[5]

(A7) On behalf of the projects, HydroPool is negotiating an Intertie access contract with a Northwest utility which will permit the projects to transmit their power to the Malin Intertie substation. At that point, the power would be delivered to PG&E, which is a part-owner of the Intertie. By contract, deliveries at Malin are deemed to take place at the California-Oregon border. The projects' Intertie access would include scheduling, dispatching, firming and banking services to enable each project to deliver its power as firm power, like any other firm

utility-to-utility delivery over the Intertie.

(Q8) Had you ever discussed any Northwest projects with PG&E prior to the commencement of this proceeding?

(A8) Yes. Between 1979 and 1983, I discussed at least five Northwest projects (other than HydroPool's current proposal) with PG&E which would have required interconnection on the Pacific Intertie. In 1979, one of these was the Bingen co-generation project. The others were a Windfarms wind energy project in northern Oregon, the Crown-Zellerbach project at Camas, Washington, the Arcata cogeneration project at Arcata, California, and the Aromas cogeneration project at Klamath Falls, Oregon. I discussed these projects with PG&E's legal department and generation planning department. We specifically discussed the contract pricing which would be system avoided cost, and, later, the interim Standard Offer 4 prices approved by the Commission. In addition, I was told at various times that PG&E would

interconnect projects on the Intertie provided I could arrange to deliver the power to the Intertie at Malin. PG&E, however, refused to assist in any way to arrange wheeling [6] and always predicted we would be unable to arrange deliveries to Malin. In each of these cases, it proved impossible to gain access to the Intertie in the Northwest.

Because of PG&E's position, when I started work on the northwest projects, I concentrated on obtaining wheeling to Malin. Based on the discussions with PG&E, we identified feasible projects; negotiated contracts which committed the project to HydroPool; negotiated wheeling agreements; and continued, with others, site development and initial engineering on the projects.

(Q9) Did PG&E ever change its position with respect to interconnecting your Northwest projects on the Intertie?

(A9) Yes. In approximately May 1984, I advised PG&E that HyrdoPool could deliver power to the Intertie at Malin. At the time

PG&E's generation planning department advised me that it would not interconnect HyrdoPool's projects, because 1) it was not obligated to contract with out-of-territory QFs; 2) it did not want private parties to utilize the Intertie; 3) it did not need any more power; and 4) it would only purchase from our QFs on the same terms as inter-utility sales.

(Q10) What kind of contracts did HydroPool's projects offer to execute with PG&E for the Northwest project?

(A10) HydroPool tendered Standard Offer 4 contracts to PG&E for several of its northwest projects. Each contract proposes to provide firm capacity for a 20 year term; requests Energy Payment Option 2--levelized energy prices, as defined in the Standard Offer; and elects Curtailment Option A, hydro spill and negative avoided cost.

[7]

(Q11) Of what importance is the Standard Offer 4 contract to the HydroPool projects?

(A11) The terms and conditions of Standard

Offer 4 are most important to the success of QF projects such as the HydroPool projects. For example, the firm capacity and the levelized energy pricing options provide assurance that a project will obtain predictable prices for its sales of capacity and energy. Another example is the curtailment provisions of Standard Offer 4 which limit the periods during which the utility may curtail purchases from the QF. Using these terms, and applying them to technological information such as hydrologic studies on a hydropower project, the QF developer can estimate his likely energy output and sales volume in future years for purposes of a business plan. If feasible, the project will show sufficient sales revenues to absorb the up-front costs of permits, engineering and construction, and the continuing expense of debt services, operations and maintenance. Investors and lenders review this business plan to determine if the project is feasible and credit-worthy.

Without the certainty and pricing which Standard Offer 4 provides, project developers and owners cannot obtain the financing necessary from investors and financial institutions. Since generating facilities are capital intensive, the obtaining of financing is a prerequisite to the successful completion of any QF project. For projects which have significant operating costs, such as cogenerators, predictable, fixed pricing permits a decision on whether a long-term economic commitment can be made to operate under the requirements of a firm power [8] contract. It is common knowledge that QF projects cannot be financed, built or operated on the basis of whatever avoided costs happen to apply from day-to-day. Without a Standard Offer, HydroPool could not obtain the financing needed to complete its projects.

(Q12) Did you contemplate using Standard Offer 4 in developing the HydroPool projects?

(A12) Yes. My earlier discussions with PG&E included use of avoided-cost pricing, and,

later, the newly-adopted, interim Standard Offer 4. I understood that the Commission's prior orders in the OIR-2 proceedings did not discriminate against QFs located outside of the service territory in making Standard Offer 4 available. I therefore planned on using the Standard Offer 4 contract while developing the HydroPool projects and negotiating for wheeling agreements and financing agreements.

(Q13) When did you become aware of the possibility of transmission constraints on PG&E's northern bulk system.

(A13) After the Commission investigation commenced, HydroPool was advised of a series of workshops sponsored by Public Staff to discuss the transmission constraints issue. Our staff, and consultants attended several of these workshops which ultimately led to the proposal of the so-called Interim Solution Stipulation.

(Q14) Did the workshops discuss any special provision for deliveries to the Pacific Intertie?

(A14) From the reports provided me by my staff and consultants who attended the workshops, I understood that the Intertie line was affected by transmission [9] constraints on the bulk system and that the proposed interim solution would not affect HydroPool's plans to interconnect on the Intertie one way or the other.

(Q15) Did your understanding in this regard change at any time?

(A15) Yes. After the proposed stipulation for an interim solution was published last summer, the language appeared to limit the interim solution to only those QFs who were physically located within PG&E's northern service territory. HydroPool then moved that the Commission delete this limitation in its order.

(Q16) Has HydroPool taken any steps to obtain transmission capacity from PG&E for its Northwest projects?

(A16) Yes. After the commission's August 1, 1984 decision, which removed the "service area"

limitation and included our projects, HydroPool again requested transmission capacity from PG&E. A copy of this request is attached as Exhibit -A hereto.

(Q17) Did PG&E respond to your request for transmission capacity?

(A17) Yes. PG&E advised me that it had reserved 66.2 megawatts of the 990 megawatts (now 1150) which the Commission had established in the order approving the interim stipulation. But it contended that the interim order did not include HydroPool. PG&E would not move forward with an interconnection study, provide me with an estimate of the cost of such a study or move forward with executing a Standard Offer. A copy of PG&E's letter reserving capacity is attached hereto as Exhibit -B.

[10]

(Q18) Has HydroPool taken and further steps to obtain a contract with PG&E for their output?

(A18) Yes. We tendered signed contracts to PG&E for several of the projects. However, PG&E has refused to sign them because of the pendency of this proceeding. In addition HydroPool tendered an interconnection fee of $16,000 to PG&E and requested that it commence an interconnection study for the HydroPool projects. PG&E returned this check to us. A copy of our letter providing this information is attached as Exhibit -C.

(Q19) Has HydroPool offered to abide by the terms of the Interim Solution approved by the Commission?

(A19) Yes. In our letter of August 7, 1984 we specifically advised PG&E that we were willing to enter into the special agreement to abide by the Interim Solution and pay the surcharge called for by that order.

(Q20) Has HydroPool complied with the steps called for by the Interconnection Priority Procedure?

(A20) PG&E advised us that we are not required to take these steps until we receive

an allocation of capacity. We never even received an IPP questionnaire from PG&E to complete. However, we have tendered signed Standard Offer 4 contracts to PG&E and requested an interconnection study. We have also submitted the small power survey with the necessary project information, after receiving it from PG&E. We are further prepared, if required, to pay the $5/KW fee if the Commission permits the HydroPool projects to proceed. This sum would total approximately $331,000.

(Q21) How has the pendency of PG&E's Petition For Modification affected the HydroPool projects?

[11]

(A21) The impact has been severe. The uncertainty created by this proceeding has caused our investors and lenders to become most cautions in committing further funds for the necessary engineering, site-permitting and other expenses necessary for development to proceed apace. In addition, the need for

representation has generated considerable legal expense to HydroPool. Most importantly, the delay by PG&E puts our projects at the risk of changes in the price and/or terms of Standard Offer 4 which has not yet been finally approved by the Commission. Any adverse change in the terms of the contracts would generate more uncertainty and scare-off our owners and investors.

As of today, it is possible that some of HydroPool's original projects never will be built, and some of the cogeneration projects will be mothballed. If that were to happen, HydroPool could, to some degree, still fill the 66.2 megawatt limit by increasing the contract or design output of some of its other projects. At some point, however, we will lose the benefit of our right to sell power to PG&E, our long-term efforts, a $631,500 investment, and our total compliance to date with the spirit and the letter of this Commission's orders. It is most important that the Commission decide this issue

expeditiously. We twice notified PG&E of this problem. A copy of our letters are attached as Exhibits -C and D.

(Q22) What will happen to the HydroPool projects if they are not permitted to interconnect with PG&E on the Pacific Northwest Intertie?

[12]

(A22) The hydro projects will die, and the co-generation plants will wither on the vine. The only economic markets for these projects are in California. The only way to reach California is over the Intertie. There are no other existing transmission lines over which our projects can both wheel power and deliver it to the PG&E system.

(Q23) How much power does HydroPool plan to deliver to PG&E if permitted to interconnect on the Intertie?

(A23) Based on the ultimate mix of projects selling to PG&E, the projects will deliver annual energy of roughly 500 Gigawatt/hours. This is approximately 4% of the total Intertie

purchases for 1986 forecasted by PG&E's Mr. Kerler in Exhibit No. 3 in this proceeding.

(Q24) What other projects propose to deliver to PG&E over the Intertie under the interim Solution?

(A24) To my knowledge, none. PG&E's original list of projects eligible for transmission capacity in the constrained area showed 92 projects, besides HydroPool, none of which interconnect to the Intertie. According to PG&E, 124 other projects are on the waiting list for an allocation of transmission capacity in the constrained area, and none of these propose to deliver over the Intertie.

(Q25) Does this complete your prepared testimony?

(A25) Yes it does.

Exhibits Introduced Before the California PUC in Connection with the Testimony of Ivan Gold

August 7, 1984

Elmer Hall
Pacific Gas and Electric Co.
77 Beale Street
San Francisco, CA. 94106

Dear Elmer:

As your know, HydroPool by letter to you dated August 2, 1984, requested interconnection of several projects which it is developing in northern California. HydroPool also is involved in the development of various hydroelectric projects, and one wood waste-fired cogeneration project in the Pacific northwest. Each of these projects will be, or is, a qualified facility (QF) pursuant to the Public Utilities Regulatory Policies Act of 1978 (PURPA). We hereby request that PGandE interconnect with and purchase the power from each QF, listed herein, pursuant to the provisions of PURPA and relevant decisions of the California Public Utilities Commission.

Each QF will sell power to PGandE on a firm basis pursuant to PGandE's Standard Offer No. 4, for a term of not less than fifteen years. Each QF will deliver power to the PGandE system at the Malin substation of the Pacific Northwest-Pacific Southwest Intertie. HydroPool will take responsibility for arranging the delivery, dispatch, metering and scheduling of such power to PGandE's system.

HydroPool does not believe that any special facilities are required for interconnection of these QFs with the PGandE system. However, each QF will pay the reasonable cost of any interconnection study which might be required.

Exhibit 13-A
(cont'd.)

HydroPool acknowledges that PGandE contends that it is experiencing or expects to experience transmission limitations on its bulk transmission system, including the Pacific Northwest-Pacific Southwest intertie, and on its area transmission system. Accordingly, each QF agrees to be bound by the provisions of the CPUC's Interim Order No. 84-08-037, dated August 1, 1984.

* * *

[3]Please provide HydroPool with cost estimates for any necessary interconnection studies and contact us to schedule when we might meet to commence discussions with regard to the Power Purchase contracts which must be executed for each of these projects. Please also indicate to us the transmission priority which these projects will have.

We appreciate very much your cooperation in this matter.

Very truly yours,

/s/

Ivan Lewis Gold

ILG:ba
cc: E. Lozowicki, Pettit & Martin

Exhibit 19

January 8, 1985

Mr. Doug Wagoner
HydroPool
2539 Larkin Street
San Francisco, CA 94019

Dear Mr. Wagoner:

I have reviewed your November 26, 1984 letter and offer the following as my response.

As stated in my November 9, 1984 letter to you, PGandE believes that it is not obligated under Decision No. 84-08-037 to allocate transmission capacity to QF projects, such as yours, which would deliver power on the Intertie, and therefore has not done so. However, since this matter is pending before the CPUC, we are currently holding in reserve 66.2 MW which could be made available to HydroPool if the Commission so requires. Any allocation of such capacity will be made in accordance with the appropriate Commission Orders. Decision No. 84-08-037 applies only to QFs in the Northern portion of PGandE's service territory which execute a Power Purchase Agreement and pay for a detailed interconnection study. However, should the CPUC ruling require PGandE to allocate transmission capacity under this Decision to HydroPool, HydroPool will be given a specified time (originally I quoted 2 weeks) in which to satisfy these two criteria.

Although you delivered signed Standard Offer No. 4 contracts for seven of your projects, those contracts are invalid. First of all, we do not believe it is appropriate to execute an agreement to buy your power until the CPUC determines that your projects are eligible under the Stipulation. Secondly, the Standard Offers are inapplicable to projects outside the PGandE service territory. If the CPUC

determines you are eligible, we will certainly permit you to take steps necessary to complete that eligibility.The seven (7) Standard Offer No. 4 power purchase agreements that were delivered to our office November 16, 1984 were completed incorrectly. In each contract, Article 3(d), maximum rate of delivery, cannot be determined until a detailed interconnection study has been completed for the facility. Additionally, the firm capacity amount that should be inserted in Article 5 will have to be determined by PGandE after HydroPool submits, and PGandE reviews, a theoretical operation study for each project as referenced in Appendix E, Section 3-7 of the power purchase agreement. Also, as pointed out in your November 26 letter, "Firm capacity availability date" should have been included in Article 12, Term of Agreement, instead of "date of initial energy deliveries".

[2]
You also state in your November 26 letter that you recognize the need for additional "agreements" between HydroPool and PGandE to address these circumstances that are unique to delivery of wheeled power to Malin (i.e., metering, scheduling, etc...), rather than direct interconnection to the PGandE transmission system. This is essentially correct, although those "agreements" must be embodied in the Power Purchase Agreements and not in separate documents. For that reason, a standard power purchase agreement is not workable for out-of-area projects. Project-specific issues must be incorporated into a negotiated non-standard power purchase agreement for each project. Should the CPUC require PGandE to allocate transmission capacity under Decision 84-08-037 to HydroPool, PGandE would be willing to allow HydroPool to execute an interim document

Mr. Doug Wagoner January 8, 1985

dealing with power purchase and pay for an interconnection study(s) to satisfy the two criteria required of QFs to participate in Decision 84-08-037. Sufficient time will then be allowed for development of the non-standard power purchase agreements mentioned above. Additionally, documentation demonstrating that wheeling and scheduling satisfactory to PGandE will be available to deliver the power from your proposed projects to the PGandE system will be required before power purchase negotiations can be concluded.

With respect to the $16,000 check also delivered to us November 16, 1984 for a detailed interconnection study for these projects, study costs identified on our flat fee table are not applicable to out-of-area projects because of their unique nature. Among other factors, we will need completed interconnection questionnaires (forms attached) for each project before we can determine if one (1) or fourteen (14) interconnection studies will be required. Therefore, we are returning your check and, should the CPUC rule in HydroPool's favor as described above, we will then determine the engineering advance that will be required for PGandE to perform a detailed interconnection study and request that amount from your.

Please call Mr. Tom Jefferson at (415) 972-4153 if you have any additional questions or would like to discuss this further.

Sincerely,
/s/
E. E. Hall

GTJefferson(4153):tb
Attachment
bcc: LHEverett
RCJones
MSHindus

APPENDIX T, ORIG. ATTACH.

COGENERATION SERVICES, INC.
2539 LARKIN STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 885-0343

DATE	INVOICE	AMOUNT	

1155

11-35
1210

PAY ---SIXTEEN THOUSAND AND NO/00---------- DOLLARS

PACIFIC GAS AND ELECTRIC CO

DATE NOVEMBER 16,1984 $ --16,000.00

TO THE ORDER OF

BANK OF AMERICA
SAN FRANCISCO MAIN OFFICE SAN FRANCISCO, CA 94104

⑈001155⑈ ⑆121000358⑆00337⑈02667⑈

Excerpts from Prepared Sworn Testimony of James Malinowski Before the California PUC.

* * *

[3]

Q7. What is the purpose of your testimony?

A7. The purpose of my testimony is to demonstrate that transmission capacity is not currently available for QF development in PGandE's system and to describe how PGandE plans to provide that capacity. In Addition, I am proposing that CPUC permit PGandE to absorb through rates the reasonable costs of non-dedicated transmission upgrades necessary to take QF power.

[4]

Introduction

As California utilities, CPUC, and QFs have all recognized, QF development in California in the 1980s has taken all parties by surprise. From 1980 to 1984, the number of megawatts (MW) QF contracts signed by PGandE increased thirtyfold, and the number of operational MW increased by 1,256%.

Year	CUMULATIVE MW Contracted	Operational
1980	204	75
1981	885	113
1982	1,187	241
1983	2,298	566
1984	6,593	942

This unexpected increase in QF power outstripped the available capacity of the transmission system in the northern portion of PGandE's service territory. This situation could not be remedied quickly, since the lead times for major transmission projects generally exceeded the lead times for QF projects.

As PGandE became aware of the limited transmission capacity for QF generation in the northern portion of its service territory, PGandE notified the Commission staff. As a result, on April 18, 1984, the Commission issued OII 84-04-077 to investigate whether transmission constraints exist for the state's electric utilities which limit QF development.

[5] The OII requested PGandE and other utilities to respond to a series of questions by June 1, 1984. PGandE's response indicated that no firm capacity was available for additional QF development on the bulk and several area transmission systems. That filing also identified potential bulk and area transmission upgrades in the northern area which could accommodate 1,150 MW of QF development. This testimony discusses in detail the transmission constraints, as well as PGandE's plans for providing reinforcements needed for QF development beyond 1,150 MW.

Specifically, this testimony:

- o presents an overview of the PGandE electric transmission system;

- o demonstrates that no firm spare capacity is available on the northern bulk system and on a number of area transmission systems;

- o provides the estimated cost and expected operating date of identified potential transmission upgrades;

- o proposes how the cost responsibility of the upgrades should be treated;

[6] - o proposes to refund 1.2 mills/kWh to QFs who are included within the Interim Solution, but proposes to continue the 0.5 mills/kWh assessment for the life of the contract to the stipulated 1,150 MW; and

- o presents a plan to accommodate QFs beyond the first 1,150 MW of northern QFs.

Electric Transmission System

The PGandE area and bulk electric transmission system is shown in Attachment 1 in the Appendix.

The area transmission basically consists of 60 kV and 115 kV systems and 230 kV radial lines. These lines connect the area loads and generation resources to the bulk system. They transmit generation which the local load does not absorb to the bulk system.

The bulk transmission consists of 230 kV systems and 500 kV lines. The 230 kV systems carry generation to the areas where it is needed (load centers). The 500 kV lines carry some surplus generation and transfer it to the 230 kV system. However, their primary use is to transfer power from the Oregon border to central and southern California. [7]

Existing Transmission Capacities

Bulk Transmission

The availability of bulk transmission capacity is affected by a complex and changing array of variables. These variables include existing and future load levels and patterns, and existing and future generation levels and patterns.

In PGandE northern area, generation consists of area hydro, imports (from the Northwest and Sierra Pacific), Geysers, Rancho Seco, other entities, and QF projects.

Given anticipated load and resources, including anticipated levels of QF generation, PGandE expects the capacity of portions of its northern bulk transmission system to be exceeded in the next ten years (and beyond) during certain hours of each year. Therefore, no firm capacity is available.

In the southern part of its system, PGandE continuously monitors QF development in an effort to anticipate transmission needs and has recently informed the CPUC of possible lack of available capacity in certain areas should large enhanced oil recovery (EOR) projects develop.

The short lead time of most QF projects relative to that of many transmission reinforcements means that there may be some periods [8] of time in which QF generation and transmission capacity, prior to completion of reinforcements, are not perfectly matched.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

As shown below, the northern area already has considerably more resources than can be absorbed by the local load.

Load, Excluding System Line Losses (MW)
and
Resources, Excluding Northwest Import (MW)

Main Area	Installed Capacity	Typical Resources On Line	Peak Load	Surplus Resources	Resources Needed To Meet Load
Northern	8,892	7,290	5,328	1,962	-
Bay Area	4,670	2,232	5,540	-	3,308
Southern	7,290	5,366	5,062	304	-

Northern Area includes SMUD and Humboldt, Shasta, Colgate, Drum, De Sabla, North Bay, Sacramento, and Stockton Divisions.

Bay Area includes San Francisco, East Bay, and San Jose Divisions.

Southern Area includes MID, TID, and San Joaquin and Coast Valleys Divisions.

The above data represent the anticipated system peak load condition in summer 1985. In this scenario, the northern area has surplus resources of 1,962 MW. If 2,800 MW of Northwest import were added, the surplus would be 4,762 MW. Most of this surplus will be transmitted to meet Bay Area load requirements. The rest will be exported

to southern California and also will account for the system line losses. This transfer of power from the northern area to the Bay Area and southern California will load up some transmission lines to their capacity. Therefore, any amount of QF generation added in the northern area would [9] cause some transmission lines to overload (to carry power beyond their design current carrying capacity).

In September 1983, PGandE conducted a study on the northern half of its system to determine whether the existing bulk transmission system would have available capacity for QF development after January 1, 1984. Two conditions were examined for 1984: The summer peak, and spring partial peak. The study showed that the existing bulk transmission had no available capacity for firm transmission of QF power. Adding QF power after January 1, 1984 would, under normal conditions (with all lines in service), overload the following 230 kV lines and 500 kV capacitors:

a. Gold Hill-Tesla

b. Rancho Seco-Tesla

c. Bellota-Tesla Nos. 1 and 2

d. Tracy-Tesla Nos. 1 and 2

e. Vaca-Dixon-Contra Costa Power Plant (CCPP) Nos. 1 and 2

f. Vaca-Dixon-Moraga Nos. 1 and 2

g. Round Mountain-Table Mountain 500 kV series capacitors

The table below summarizes the amount of overload as a percentage of the normal design capacity of the transmission line or capacitor when either 300 MW or 1,150 MW of northern QFs are added. The amount beyond 100 percent indicates the amount of overload. For example, 109 means that the line is overloaded by 9 percent.

[10] The normal design of the line was based on the summer rating for the conductor. This rating is used to determine the maximum continuous load allowed on the conductor at conditions including an ambient temperature of 109.4^{o}F and wind velocity of 2 feet per second.

	Percent Loadings System Load Condition		
	Summer Peak		Spring Partial Peak
230 kV Line	300 MW	1,150 MW	300 MW
Gold Hill-Tesla	63	74	109
Rancho Seco-Tesla	61	70	118
Bellota-Tesla Nos. 1 and 2	59 & 65	70 & 77	146 & 157
Tracy Tesla Nos. 1 and 2	34	46	108
Vaca-Dixon-CCPP Nos. 1 and 2	96 & 102	104 & 111	97 & 107
Vaca-Dixon-Moraga Nos. 1 and 2	95 & 103	106 & 107	105
500 kV Series Capacitors			
Round Mountain--Table Mountain	98	103	106

These line overloads are also shown in five power flow diagrams (Attachments 2, 3, 4, 5, and 6).

The study assumed that the Castle Rock Junction-Lakeville 230 kV line would be in operation in November 1984 and the Lakeville-Sobrante 230 kV line in November 1985. The study also assumed that the existing 500 kV series capacitors between Table Mountain and Vaca-Dixon and between Table Mountain and Tesla would be uprated from 1800 amps to 2667 amps in summer 1984.

[11] The Castle Rock Junction-Lakeville line was put in operation as scheduled and the Lakeville-Sobrante line is on schedule. However, the 500 kV series capacitors at Table Mountain were not operating during 1984 due to delays in construction. All uprated series capacitors are now scheduled to become operational in September 1985. This change does not change our conclusion. Therefore, the bulk transmission system would have no available capacity for firm transmission of additional QF power.

Area Transmission

PGandE also determined that constraints existed on some area transmission systems in the northern part of our system. Most of the northern area of PGandE's service territory can best be described as rural or suburban. As a result, the electrical load density in most of the area is small compared to metropolitan areas. Moreover, load growth in much of the northern area has been low. These conditions have resulted in long transmission lines, usually 60 kV or 115 kV, of relatively low capacity. These connect the area loades and resources to the bulk 230 and 500 kV system. Given these conditions and the fact that the northern area already has generation resources in excess of load and the disparity in leadtimes between transmission projects and QF projects, it was nearly inevitable that QF development in many areas would cause the need for reinforcements.

[12] Attachment 7 lists generation, loads and transmission capabilities of the constrained areas in the northern part of

PGandE's system. Attachments 8-1 to 8-11 describe in detail the constraints and possible upgrade for each of the areas.

* * *

[15]

Refund 1.2 mills/kWh to QF But Continue 0.5 mills/kWh Assessment

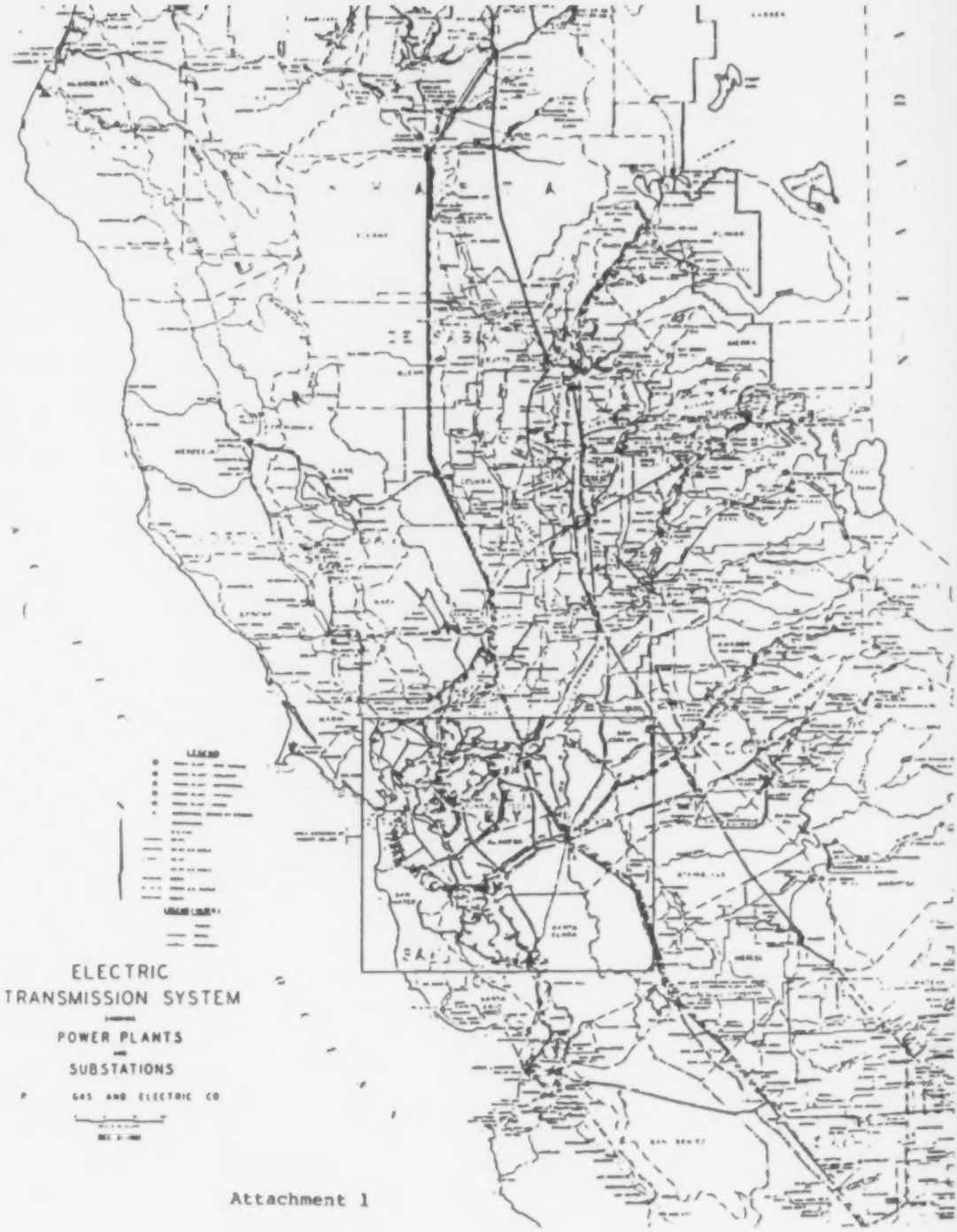
On August 1, 1984, the CPUC adopted the Interim Solution in Decision 84-08-037. The Interim Solution allowed QFs included in the stipulation to connect in PGandE's northern transmission system. In return, these QFs were assessed 1.7 mills/kWh for the energy received by PGandE. The CPUC authorized PGandE to take operational measures, including non-economic dispatch of power, to accommodate these QFs until PGandE completed the needed upgrades.

Under the terms of the stipulation, 0.5 mills/kWh of the 1.7 mills/kWh is non-refundable. All or some of the remaining 1.2 mills/kWh could be refunded depending on the final decision of the CPUC in this proceeding.

APPENDIX U, Orig. pgs. 12, 15

Since PGandE has proposed to absorb the cost of non-dedicated transmission upgrades, PGandE proposes to refund in lump sum [16] without interest 1.2 mills/kWh paid by the QF prior to the Commission's final decision. However, PGandE believes that 0.5 mills/kWh should continue to be assessed throughout the life of the contract. This position is based on the fact that PGandE will have to take non-ecomonic measures in order to accommodate up to 1,150 MW of QF power prior to completion of the upgrades.

For example, if PGandE reduces the Northwest import in order to take up to 1,150 MW of QF power, it estimates that the cost to the ratepayer would be from $64 million to $84 million per year. Therefore, PGandE also proposes that it is just and reasonable that the QFs covered by the stipulation continue to pay the 0.5 mills/kWh for the entire life of their projects.



Attachment 1

APPENDIX U

POTENTIAL BULK TRANSMISSION UPGRADES FOR UP TO 2,000 MW OF NORTHERN QF

		Estimated Cost (in Million of 1984 Dollars)
o	Upgrade Round Mountain series capacitors.	26.1
o	Build new Table Mountain - Tesla 500 kV line and install series capacitors and transformer banks at both ends.	154.8
o	Replace conductors of Weber-Tesla section of the Bellota-Tesla 230 kV DCTL with SSAC	7.5
o	Add two circuits of two 3,500 kcmil cables at the underground section of Castel Rock Junction-Lakeville line.	5.4
o	Rebuild the Lakeville-Vaca-Dixon 230 kV DCTL with 2-1113 kcmil AAL conductors.	27.8
	TOTAL	221.6

Excerpt from Prepared Sworn Testimony
of John Kerler before the
California PUC

[4]

* * *

Q8. Could a third party such as a QF utilize PGandE's unused intertie capacity?

A8. During those hours that PGandE's intertie capacity was not being fully utilized due to minimum loads on the PGandE system, each additional megawatt hour scheduled to PGandE would require backing down an additional megawatt hour of Northwest economy energy or a lower cost resource in the PGandE area. Depending on the situation it would be either nuclear, geothermal or hydroelectric generation. During most other situations that PGandE's intertie capacity was not fully loaded it would be difficult to utilize the unused line capacity.

[5] Energy delivered to PGandE is scheduled at least 30 minutes in advance of the hour by BPA. They do not normally make schedule changes closer to the hour. Only during those relatively few hours each year

that Northwest supplies are insufficient to fill the intertie would a third party be able to utilize the unused capacity even though it would be difficult to know in advance when this situation would occur.

Q9. Does BPA's intertie access policy have any effect on PGandE's ability to fully utilize its intertie capacity?

A9. The BPA intertie access policy was implemented in September 1984. While it is expected to increase the price that PGandE pays for Northwest energy it does not appear that it will decrease the availability of Northwest energy. The proposed BPA rate increase to be effective for the period July 1, 1985 through September 30, 1987, has a maximum rate for surplus firm power of 29.0 mills per kilowatthour which is below our current cost of fossil fueled generation. It is expected that beyond 1987 BPA will price their energy so as to be competitive with fossil fueled energy.

Q10. How will proposed upgrades in the rating of the Pacific Intertie capability affect PGandE's use of its intertie capacity? [6]

A10. An increase in the rating of the 800 kV DC line from 1560 MW to 1960 MW is expected in February 1985. PGandE is entitled to 25% of this 400 MW increase or 100 MW. A proposed upgrade of the 500 kV AC lines from 2800 MW to 3200 MW is anticipated sometime after 1986. PGandE is entitled to 50% of the proposed 400 MW increase or 200 MW. In forecasts developed for 1984 through 1988 I have assumed full utilization of the additional intertie capacity subject only to an estimated 5% limitation in 1984 through 1986 and 10% in 1987 and 1988.

Q11. In sum, is it your testimony that Northwest Power will be available to fill the Intertie at least through 1988?

A11. Yes.

* * *

Excerpts from Transcript of Pre-Hearing Conference Before California PUC on Petition of PG&E and IEP to Exclude HydroPool from the Terms of the Interim Solution.

* * *

[71]

MR. HINDUS: Your Honor, obviously, you are going to be the first one to make a decision on these comments. The Commission will ultimately make a decision.

I am concerned that there has been nothing stated here as to why the parties who drafted the stipulation are standing by it.

I am not an engineer. Ms. Fellman isn't an engineer. There hasn't been any evidentiary hearings on this issue.

But I will try to explain as distinctly as I can.

But basically, the power that is delivered to us directly on the 500 kV line mostly through or that would be delivered to use mostly through the PP&L system directly displaces Northwest Energy on a one-to-one basis.

* * *

[77] MS. FELLMAN: The staff position today is that, again, we support the stipulation as drafted. If the Commission finds that there are reasons to include additional QFs outside of the PG&E service area or ourside of the, I should say, the basis of the stipulation, the [78] projections of QFs, then the staff would not be able to support that Commission decision because we have not identified what the ratepayer impacts would be, not only from so-called diseconomies which I don't even want to get into today in terms of the detail of that, but I will only say that again, when we're dealing with specific areas outside the PG&E service area, the impacts on the ratepayers are geometric rather than arithmetic because there's a direct one-to-one competition not only for the 500 kV line, but also for lines in the northeastern portion of the service area.

* * *

[91] MR. HINDUS: The stipulation is clear on its face. There are no upgrades on the

intertie that PG&E agreed to build under the stipulation.

Futhermore, there are no upgrades on the intertie or any interties that are built to take more QF power.

Therefore, what Cogeneration Services is asking for is not interim. They are asking for a right to displace economy energy permanently for the life of their contract.

Secondly, the interim solution stipulation is a solution. It identified the problem and it seeks to resolve this problem through the agreed upon upgrades.

There is no solution proposed for the intertie. There are no upgrades proposed for the intertie in order to take QF power.

* * *

Excerpts from Transcript of Hearing Before
California PUC on Petition of PG&E
and IEP to Exclude HydroPool
from the Terms of the Interim Solution

* * *

[16] MR. HINDUS: Just to summarize very briefly the thrust of the statement that I gave last week, I emphasize that the interim solution was intended to be only interim, not only until upgrades were built, that the upgrades were specifically identified in Attachment 1 to the stipulation, that the attachment gave a full description of each line that was to be upgraded, its costs, its estimated completion date and that the Attachment 1 provided no upgrade at all for the intertie.

I also indicated last week that we would not have supported the stipulation if it included the intertie.

[17] And if the Commission had issued this as an order including the intertie, we would have appealed that order.

APPENDIX X, pgs. 16, 17

Miss Hamrin and Miss Fellman indicated that the stipulation didn't cover other areas in which there were differences between the parties, areas in which we could not agree.

And we also emphasized that the stipulation is not the end of the OII. It is just the beginning.

The stipulation was not intended to because it could not possibly resolve all issues, all areas, all projects.

There are issues to be determined in this OII 56, a full investigation. And the parties who participated in drafting the stipulation clearly believe that the question of QF access to the intertie is one of those areas that could only be determined after a full investigation.

Now, since all the parties who drafted the stipulation agree on the intent of the stipulation, as a matter of law, that should be the end of this issue.

But there is another issue, and your Honor asked us to present the reasons for this intent to exclude the intertie from the

stipulation. In other words, you were asking us: Was there a reasonable basis for this, or was this something that we just took out of the air in sort of an irrational moment [18] at the hours of a negotiation?

The testimony that PG&E will present today will show that PG&E did have a reasonable basis for excluding this stipulation -- excluding the intertie from the stipulation, and that this exclusion was not discriminatory.

And the reasonable basis that this testimony will show is that QF power on the intertie would displace economy power nearly one for one.

* * *

[37] MR. LOZOWICKI: Q In other words, you don't have -- PG&E does not have enough room given the current entitlements to accommodate both what it would like to buy in the way of economy power and QF power that has been tendered by my client?

MR. KERLER: A Physically, there is a fixed amount of capacity on the intertie. And based on again the economics,

we would be displacing a lower cost resource to take a QF megawatt on the intertie.

MR. LOZOWICKI: Q One way of solving that capacity problem would be to build more capacity on the intertie; wouldn't it?

MR. KERLER: A Additional line capacity would certainly open up additional ability to transmit power into the area.

However, there are times again, even with the additional line capacity, due to minimum load situations, additional capacity may be required to offset lower cost generation in our own area.

MR. LOZOWICKI: Q And part of minimum load in your own area that you are referring to is the QF supplies available in PG&E's --

MR. KERLER: A Between those periods, they can't be backed down. That is correct.

MR. LOZOWICKI: Q Okay. Is it also true that PG&E is currently negotiating

for the construction of additional capacity on the intertie?

[38] MR. HINDUS: I am going to object, your Honor. I don't see what this has to do with the intent of the stipulation.

* * *

[40] MS. FELLMAN: Our discussion during the stipulation did not include any discussion of upgrades on the intertie.

It was my understanding that the hearing today would be limited to the bases upon which PG&E kept this intertie out of the stipulation and the intent of doing so.

* * *

[42] MR. LOZOWICKI: Your Honor, the only fact I would seek to prove in this line, if I can make an offer of proof, is that some plans are in the workings.

I don't plan to go into that in details of the line.

MR. HINDUS: Your Honor, I continue my objection. If he is allowed to continue to ask questions on it, I would --

ALJ WU: Take exception?

MR. HINDUS: Take exception, and also state this is not the appropriate witness.

MR. LOZOWICKI: Your Honor, would they be willing to stipulate that the negotiations are -- we all know they are going on. If we can get a stipulation, there won't be any need for the questions.

ALJ WU: Is PG&E willing to concede to something that is going on?

MR. HINDUS: I am willing to make a stipulation on the negotiations for a third line which will transmit its entire capacity of economy energy to California.

That is the only stipulation I am willing to make.

[43] MR. LOZOWICKI: May I have a minute, your Honor.

ALJ WU: Off the record.

(Off the Record)

ALJ WU: Back on the record.

MR. LOZOWICKI: In response to a data request from Cogeneration Services, my client, Pacific Gas and Electric was asked with

respect to their plans for the construction of new AC and DC lines on the Pacific Northwest intertie.

They made the following response in their data request:

> PG&E objects to this request because the state of the third AC line is beyond the scope of the interim solution since it would not be operational until 1990 at the earliest, and because there were no definite plans for that line when the interim solution was drafted. Without waiving this objection, PG&E notes that as of December 12, 1984, no contracts between PG&E and third parties regarding construction of a third AC line have been executed. Such a document is likely to be executed in the near future.

[44] My stipulation would be, your Honor, to propose that the response to the data request be admitted instead of questioning this witness.

APPENDIX X, Orig. pgs. 43, 44

ALJ WU: Any objection?

MR. HINDUS: I don't think it is evidence. I think it is argument.

But since we prepared it, I can't object to it. But I still do not agree that the third line is within the scope of this limited hearing.

ALJ WU: I will accept that as a gracious stipulation.

* * *

[46] MR. LOZOWICKI: Q Okay. With respect to the minimum loads in PG&E's own service area, you also mentioned that to some extent QF suppliers are part of that consideration; is that right?

MR. KERLER: A That's right.

MR. LOZOWICKI: Q Okay. And isn't it true that the minimum loads of the QFs are addressed in standard offers that the Commission is authorized for QF purchases?

MR. KERLER: A There are under the different options different methods of handling backdown situations.

APPENDIX X, Orig. pgs. 44, 46

MR. LOZOWICKI: Q There are curtailment provisions, aren't there, in Standard Offer 4 for backing down QF takes under hydro conditions, for example?

MR. KERLER: A Yes, there are.

* * *

[49] MR. HINDUS: Q Parenthetically, Mr. Kerler, you have already answered this question, haven't you, in your prepared testimony?

MR. KERLER: A Yes, I have. If you refer to Question 13 and corresponding Answer No. 13, I discuss the fact that the degree that the 5 and the 10 percent reduction in utilizaiton of the intertie, to the degree that those don't occur, we would fill it with economy energy.

And again, any QF energy on the intertie would back off on economy energy that we were attempting to bring in.

* * *

[51] RECROSS-EXAMINATION

BY MR. LOZOWICKI: Q With regard to your last answer, Mr. Kerler, about your understanding of the Commission's policies, isn't it also true that the Commission has encouraged PG&E and in fact directed PG&E to accelerate the development of small power resources?

MR. KERLER: A That's correct, in California I believe that's the case.

MR. LOZOWICKI: Q Are you saying that the Commission has distinguished between California small power sources and other sources?

MR. KERLER: A I am not aware of anything outside the area. So my understanding would be to promote it in California.

MR. LOZOWICKI: Q In other words, the only projects you are familiar with are California projects?

MR. KERLER: A That's correct.

* * *

[52] MR. LOZOWICKI: Q Then finally you mentioned that even if the capacity on the intertie were not being completely used because of minimum load requirements, that to accept QF deliveries on the intertie would cause a further backdown on your takes on the intertie; is that correct?

MR. KERLER: A That's correct.

MR. LOZOWICKI: Q Now the minimum loads that you are referring to that cause the original backoff include the acceleration supply of QF power in California, doesn't it?

MR. KERLER: A Yes, it does.

* * *

[358] CROSS-EXAMINATION

[BY MR. LOZOWICKI OF PGandE WITNESS MALINOWSKI]

Q Mr. Malinowski, I'm Edward Lozowicki appearing for Cogeneration Services in this case.

I'd like to ask you some questions about your prepared testimony.

On page 7, paragraph 2 you describe in general the generation in PG&E's northern

area as consisting of hydro imports from the Northwest and the Sierras, Geysers, Rancho Seco, other entities, and QF projects.

[359] Is it fair to characterize that as sort of a basket of resources that PG&E has in the northern area?

[MR. MALINOWSKI:]

A Yes.

Q And on the preceding page, page 6, in the last paragraph you mention that,

> "The 500 kv lines carry some surplus generation and transfer it to the 230 kv system."

Is the surplus you're referring to there surplus from this basket of generation resources?

A Those that operate on the lower voltage system, yes.

[360] Q In other words, if there is surplus beyond the capacity of the lower voltage system, it might spill over to the 500 kv system?

A We can carry -- some of the power that flows on the intertie at times could be carried on the 230 system.

We also input power from our local system into the 230, and some of that at times can be carried on the 500.

You can't identify precisely how it is carried in a general way. The system varies depending on the loadings and generation and load patterns.

Q Okay. And if that pattern created a surplus of generation beyond the capacity of the 230 lines in a given area, would you then use the 500 kv lines in that area to carry the excess?

A Yes.

Q On page 7 in the third paragraph, you mention that PG&E expects the capacity of part of the bulk system to be exceeded during certain hours of the year.

And in subsequent parts of your prepared testimony, you talk about the summer peak and the spring peak periods.

Are the certain hours that you referred to here on page 7 the summer peak hours and the spring peak hours?

A No, not limited to those. We also have [361] problems in partial peak periods.

Q So it would include peak and partial peak both?

A And off-peak. The problems in the northern area result from a situation where you had power that needs to be exported out of the area.

And whenever you have a combination of loads and generation that produces exports above a certain level, you can have line loading problems.

And another variable in the equation is the capacity of the lines which vary depending on the ambient temperature conditions.

Q So when you were discussing off-peak hours and conditions which produce that lack of extra capacity, would that include the so-called minimum load conditions?

A Minimum load is off-peak. When we talk about minimum load conditions, we more often are thinking in terms of the minimum load problems at all our generation areas, not just the northern area.

Q So that the problem you are describing here could occur at times other than during minimum load conditions?

A As far as the transmission line loading problems, yes.

Q Thank you.

Now, on page 8 you have a table which describes a comparison between load and resources [362] on the northern system.

And the fifth column in the table describes what you call surplus resources, which in the northern system would be 1962 megawatts.

Is that the proper reading of that table?

A Yes.

Q And those surplus resources, I take it, at the present would be -- strike that, please.

You mention later on that page that the surplus is usually transmitted to meet Bay Area load requirements.

Is that correct?

A Yes.

Q Would that surplus be transferred over the the bulk system to the Bay Area?

A Yes.

Q On page 9 you describe a potential overload condition on both the 230 kv line and the 500 kv capacitors as a result of adding QF generation.

Could you give me a layman's description of capacitors.

A Well, physically, a capacitor is a -- are two conductors separated by an insulating medium or a dielectric. Coming up with a mechanical analogy --

Q Are they wires?

A No. They are not wires. You have seen capacitors -- probably seen capacitors on pole lines, on tops of pole lines. They are contained in [363] cans that are about maybe 18 inches wide, three or four inches thick, and maybe 2 feet tall.

Q But physically they are found on the pole supporting the lines?

A Those are distribution capacitors. The 500 capacitors are on racks located under the lines at substations or along the line.

In our case we always locate them at the substations.

Q And in describing the effect of additional QF power here on page 9, you are saying that the addition of any significant amount of QF power would -- strike that -- would result in overload conditions on the 500 kv capacitors between Round Mountain and Table Mountain?

A Yes.

Q On page 10 you have another table which describes the potential overloading as a result of adding various amounts of QF power.

And in that table --

MR. HINDUS: Objection. I don't think that is what this table stands for.

Do you want to ask him whether it does?

MR. LOZOWICKI: Q Did you understand the question, Mr. Malinowski?

A Please repeat it.

Q Did you want it read back?

A Yes.

[364] MR. LOZOWICKI: Could we have the question read back.

ALJ WU: Miss Reporter, can you find it?

(Record read)

MR. HINDUS: I guess my objection is that I think there is a characterization there, and I guess I would ask the opportunity to voir dire the witness, having learned that term last week, and ask him if that is, in fact, what that table stands for.

Then we can continue the line of questions.

ALJ WU: I don't quite follow what your objection is, Mr. Hindus.

Would you repeat your question first, Mr. Lozowicki. You stopped someplace.

MR. LOZOWICKI: Perhaps I will try to make it more specific, your Honor.

Q Mr. Malinowski, with regard to the table on page 10 of your prepared testimony, as I understand it, that table describes the result in terms of overloading on the PG&E bulk system from the addition of different amounts of QF power at different times of the year.

Is that correct?

A That table shows for two conditions, the summer peak and a spring partial peak loadings that would result from additions of the designated amounts of QF power, in addition to the resources that are already available in that area.

[365] Q Okay. And I note that with respect to the 500 kv series capacitors that the addition of -- strike that.

With respect to your estimate of the overloading caused during spring partial peak

conditions, you have used the figure 300 megawatts of new power; is that correct?

A Yes.

Q And would the percentage of overloading be higher if we were to use 1150 megawatts during a spring partial peak rather than 300?

A Yes.

Q And is one of the reasons for the overloading during that spring partial peak period, even with 300 megawatts of new power, the effect of the spring runoff and generation in the northern area?

A I think the situation is that you do have heavy hydro availability and the loads are down, so that increases the amount of power that has to be exported from the area.

Q Is it possible that if you were to add 1150 megawatts during that spring partial peak period, that the overloading might cause some effect on the PG&E's takes of Northwest imports?

A Yes, it is possible.

Q And on page 11, summing up your description of that analysis, you mention that -- you conclude, that is, that the bulk transmission system would [366] have no available capacity for firm transmission of additional QF power.

Regarding that statement, would that apply irrespective of whether we were adding 300 megawatts or 1150 megawatts of QF power to the system?

A That is correct.

Q On page 16 in the second full paragraph, you discuss the accommodation of additional QF power beyond the 1150 megawatts currently authorized.

And in that regard, you say that PG&E is willing to negotiate non-firm agreements until such time as perhaps further transmission capacity would be built.

Would one possibility in those northern firm agreements for accommodating another project that was not included in the current eligibility list expand the curtailment rights?

A I am not sure I understand the question.

Q You refer here to a non-firm agreement in describing the kinds of agreements that PG&E would consider negotiating for a project that did not have transmission capacity within the current 1150 megawatts.

And I am trying to get an idea what kind of non-firm agreement that might be. And specifically, would that be an agreement that contemplated more curtailment than PG&E would otherwise be allowed to give to a QF?

A We don't have the right to curtail QF's [367] that are included in the 1150 in the stipulation, but we would, if we signed such a contract in the northern area, such QF's that are not included in the stipulation would be subject to curtailment until transmission reinforcements were built to eliminate the overloads that they would cause.

Q On page 17 in your prepared testimony you had discussed -- strike that --

you mention that to minimize curtailment, PG&E would implement dynamic line loading on both the bulk and area lines.

Could you give the layman's definition of dynamic line loading?

A Dynamic line loading is a procedure where our dispatchers or system operators would monitor all ambients and establish load limits based on actual ambients, rather than the assumptions we use now for line ratings where we look at the maximum expected temperature and a 2 foot per second wind that the line would see.

It basically gives us the ability to load the line up to its real thermal limit, rather than a limit established based on seasonal ambient maximum.

Q Is that something -- when you say ambient, you are referring to the ambient temperature?

A Yes.

Q Lower temperature than would permit, in effect, higher rating --

A Yes.

[368] Q -- on the line?

Would that be possible on both -- would that be possible on the bulk system as well as the area system?

A Yes. You have to be careful that the other equipment on the line is taken into account.

On the 500, the line capacitors have an absolute limit that is not affected by ambients.

But as far as the limitation due to the conductors, you would be able to load to that limit.

Q So you could make changes regarding the conductors?

A Yes.

Q In the attachments to your prepared testimony, you include a series of what I believe are called power flow diagrams, Attachments 2 through 6.

Is that right?

A Yes.

Q And as I understand these, Attachment 2 and Attachment 3 study the potential effect of adding additional QF power during the 1984 summer peak.

Is that right?

A I believe this study is showing what the loadings would be without additional QF power.

Q In other words, this is the current situation?

A Yes. This is showing with current QF's and current generation capability that we are loaded to -- the system is loaded to its limit.

[369] Q Does it also apply to the figure shown on Attachment 4?

A Okay. 3 and 4 show what happens with additional QF power.

Q Okay.

A 2 starts out with 196 megawatts of QF power in the northern area, which is what was existing at that time.

Attachment 3 adds 300 megawatts of QF to the already existing.

And Attachment 4 shows what happens if you add 1150 megawatts to the existing QF capacity.

Q I see. So on Attachment 4, for example, if the 1150 megawatts already authorized were added to the system, the handwritten note in the middle indicates that the capacitors between Round Mountain and Table Mountain would be running at 103 percent of rated capacity?

A Yes.

Q And Attachments 5 and 6, if I understand them properly, refer to the spring partial peak period?

A Yes.

Q And Attachment 5 references 196 megawatts; is that the current situation?

A Yes.

Q And this chart, Attachment 5, indicates that the Round Mountain-Table Mountain capacitors are then [370] under the current

situation running at 101 percent of rated capacity?

A Yes, with 3200 megawatts of input from the Northwest.

[371] Q And then Attachment 6 refers to the spring partial peak period with a total of 496 megawatts?

A Yes.

Q I assume 300 would be the 300 additional beyond the current QF resources in that area?

A Yes.

Q And those 300, then, would produce the 106 percent of rated capacity on the Round Mountain-Table Mountain capacitors?

A That's right.

Q And that also assumes Northwest imports of 3200 megawatts?

A Yes.

Q Would these then support your conclusion that it's possible that by adding additional QF generation before the transmission upgrades are completed might result in cutbacks on Northwest imports?

A What we've agreed to is that we would look at a combination of measures cutting back our own generation within the northern area and/or cutting back on Northwest imports.

Q Well, on Attachment 9 you outline the potential transmission upgrades planned to accommodate 1150 megawatts of QF in the bulk system, is that correct?

A Yes, that's correct.

Q And are these in fact the upgrades that [372] PG&E plans to make under the so-called interim stipulation?

A Yes.

Q And the last item on your list there talks about adding a second 500/230 kv transformer bank at Tesla.

Would that solve this problem with the capacitors between Round Mountain and Table Mountain that you described previously?

A No.

Q That problem still exists?

A Yes.

MR. LOZOWICKI: I have nothing further at this time, your Honor.

* * *

[REDIRECT EXAMINATION BY MR. LOZOWICKI OF MR. GOLD]

[834] MR. LOZOWICKI: Q Had you previously discussed before this proceeding started the concept of firming and shaping with PG&E?

MR. GOLD: A I don't know if it was before this proceeding started. But in our early meetings one of the things we proposed to do was to try and focus our delivery.

In order to make the transaction more attractive, we hoped, to PG&E from the first, we proposed that deliveries would be under peak and partial peak periods only.

Q Why would that be more valuable to PG&E?

A Well, it seemed to us that I had had discussions with PG&E personnel in the past about concerns they had that in particular, during off-peak periods [835] they feared after Diablo Canyon became operational, they feared periods of minimum system operation,

significant periods during the off-peak period certain months of the year.

In addition, we knew that energy has particular value to PG&E during peak and partial peak periods, more so than during off-peak periods. And we thought if we could provide firm power, we knew there would be resistance to delivering QF power over the intertie. There's no question. It's been tried for years. Nobody has been able to do it.

We thought that we were going to deliver firm power, we are going to deliver schedulable power, dispatchable power and we will make an ironclad assurance that we will be able to deliver it to you during the period when it is most valuable to you, partial and peak periods, and even, if possible, partial and peak periods during the summer season, that that would make them more eager to purchase the power because it would be power to them of higher quality.

Q Because it was during peak load periods?

A Well, because it was during peak load periods, because there might be other times during the year where we might be able to negotiate a situation where PG&E would say please don't deliver your power now, there's other energy we would like to buy now.

Like there is a very carefully defined period in the Northwest called the fish flush period [836] when Bonneville has to run a lot of water through the dam in order to permit the salmon to go to the ocean.

It runs for six or seven weeks, eight weeks. That's a period when you can generate a lot of economy energy.

And we thought that maybe we would make an arrangement with PG&E that you have got your provisions in your Standard Offer 4 contracts. We will make arrangements to shut down our projects or run the projects and store the energy here and deliver it at other times of the year when it is more valuable to you.

APPENDIX X, Orig. pgs. 835, 836

MR. HINDUS: Your Honor, I'm going to object to this entire last answer for the reason that Mr. Lozowicki has stated so many times before.

This in fact was the subject of confidential settlement negotiations where there's written understanding that this will be confidential.

They didn't apply to standards offers. These didn't apply to the situation where the Commission would order us to sign a standard offer.

And I think that the fact that in the context of negotiations shaping and firming might have come up is totally irrelevant to this proceeding, and particularly in view of Mr. Lozowicki's insistence that such discussions not even be referenced on the record.

MR. AJELLO: Your Honor, it does seem to be well [837] beyond the scope of this proceeding.

MR. HINDUS: We never, never contemplated -- we never saw these marketing agreements

before. We never contemplated -- in fact, I have kept these marketing agreements pursuant to Mr. Lozowicki's insistence from our negotiators.

There was never in any of these discussions a notion that there was a revenue enhancement part of that or anything like that.

And again, as I said, it was pursuant not to a standard offer. It was not pursuant to the demand that Mr. Lozowicki is making to this Commission here. I think it should be struck.

MR. LOZOWICKI: Your Honor, I am not inquiring about settlement discussions that Mr. Gold had with counsel present. I am inquiring about the other discussions that he had with PG&E prior to that time that led to this for PG&E.

I would not inquire about any settlement discussions. My understanding of his testimony is to explore the context in which firming and shaping came up in his discussions with PG&E.

As far as the scope of it goes, there's been extensive cross-examination about the concept of firming and shaping as used in the marketing agreement and as it relates to the nature of this transaction which is before the Commission.

I think I am allowed to explore -- it is [838] certainly not beyond the scope to explore what firm and shaping involves and whether or not it was previously discussed with PG&E and in what context.

MR. HINDUS: I would like to know --

ALJ WU: Overruled.

Had you finished your answer?

MR. LOZOWICKI: Do we have a question standing, Miss Reporter?

THE REPORTER: No.

MR. LOZOWICKI: Q Your prior discussions in essence were that you might exchange curtailment for firming and shaping?

A That was the reason that we included the firming and shaping provisions in our contract.

We were told by PG&E on at least three separate occasions in one meeting with Elmer Hall, in one meeting with Raphael Malano, and in one meeting I believe with Tom Jefferson that we would need to have contracts to provide for scheduling, firming of power with regard to deliveries over the intertie.

There was a time when PG&E was talking with us about the nature of the contracts we would need in addition to the standard offer to effect the transaction.

That's not to say that they agreed to do it, but they were talking about what would be needed.

Q This was prior to your subsequent settlement [839] discussions?

A Absolutely. As a matter of fact we have letters of exchange in which we talk about the kind of documents we are going to have to draft.

But specifically, at least in one discussion with Elmer Hall, we talked about that and we said we can do more than that. We

can arrange to have this power delivered, banked and stored in the Northwest and redelivered during peak and partial peak periods.

MR. HINDUS: Your Honor, now I would have to object. I was at that meeting. That was the first confidential settlement negotiation.

THE WITNESS: It was well before that. And you weren't there.

MR. LOZOWICKI: Your Honor, the witness has had meetings with PG&E that were not settlement meetings attended by counsel. I am not inquiring into those settlement meetings.

THE WITNESS: To my knowledge, your Honor, the meeting I am now talking about I think took place in August. It could have been the meeting at which we delivered the August 8th letter. That is what I think it was.

That is just not the settlement meetings you're talking about.

ALJ WU: Let's proceed.

MR. LOZOWICKI: Thank you, your Honor.

Q Why is firming of power necessary for intertie [840] deliveries?

A As I stated earlier, you have to have a block of power coming across the intertie on an hourly basis.

What PG&E said and what we agreed with was that they would want evidence that such firming and shaping short term at the very minimum would be arranged because otherwise you can't have if, as and when deliveries on the intertie within the context of a dispatcher and a schedule.

The intertie is loaded in even megawatt or even 10 megawatt blocks or maybe even hundred megawatt blocks from hour to hour.

Q So this blocking of power is done currently?

A With all transactions.

Q Between the other utilities that deliver to the intertie?

A Always.

Q So those utilities are practicing to some extent firming and shaping now?

A Yes. And in addition, there is firming and shaping between seasons or between diurnally, daily and night, firming and shaping and storing of power.

Q How does that occur at present?

A Somebody ships power down during peak periods, and that utility ships power back up during the off-peak periods.

And according to the bookkeeping of the [841] transaction, the only thing that's changed hands is peak. It's called naked peak, for example, when in fact there really is no such thing as naked peak.

You can't deliver capacity without energy, but capacity comes down and capacity and energy comes down and energy only is returned or energy is taken out of the Northwest and redelivered. And there's a whole series of bookkeeping transactions.

Q You say this practice goes on at present on the intertie. Is that the essence of the so-called exchange agreements?

A Some of the exchange agreements. That goes to issues like the seasonal diversity and daily and peak delivery agreements.

* * *

CONSTITUTION

* * *

The Congress shall have Power To . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . CONST. ART. 1, SECTION 8

* * *

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. CONST. ART. 1, SECTION 10.

* * *

§ 824a-3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to--

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking

authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying

cogeneration facility or qualifying small power production facility, the rates for such purchase--

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

* * *

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such

cogenerator or small power producer, such utility would generate or purchase from another source.

* * *

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

* * *

EXCERPTS from 18 C.F.R. §292

* * *

. . .

(6) "Avoided costs" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source. 18 C.F.R. §292.10(b)(6).

* * *

§292.303 Electric utility obligations under this subpart.

(a) Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with §292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the elctric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section. 18 C.F.R. § 292.303(a).

* * *

APPENDIX Y

(d) Transmission to other electric utilities. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to §292.304(e)(4) and shall not include any charges for transmission. 18 C.F.R. §292.303(d).

* * *

§292.304 Rates for purchases

(a) Rates for purchases. (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases. 18 C.F.R. §292.304(a).

* * *

(d) Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified

term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred. 18 C.F.R. §292.304(d).

* * *

(f) Periods during which purchases not required. (1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself. 18 C.F.R. §292.304(f)(1).

* * *

APPENDIX Y

Supreme Court, U.S.
FILED
NOV 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HYDROPOOL AND COGENERATION SERVICES, INC.,
Appellants,

VS.

CALIFORNIA PUBLIC UTILITIES COMMISSION
and PACIFIC GAS & ELECTRIC COMPANY,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

JANICE E. KERR
(Counsel of Record)
HECTOR ANNINOS
ANNE K. MESTER
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 557-2380

Counsel for Appellee
The California Public
Utilities Commission

November 28, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

Page

I

Opinions below 1

II

Jurisdiction 2

III

Statement of the case 2
- A. Federal background 3
- B. Origins of the proceeding at issue 4
- C. The Interim Solution 5
- D. HydroPool's attempts at inclusion in the Interim Solution 5
- E. The Commission's decision 8

Argument 10

I. HydroPool's commerce clause argument does not present a substantial federal question 10
- A. HydroPool's factual analysis does not support a finding of discrimination against interstate commerce .. 11
- B. HydroPool's legal analysis asserts the wrong test ... 13

II. HydroPool's contract clause argument does not present a substantial federal question 17

III. Granting the relief HydroPool seeks would undermine California's authority under PURPA and would decimate state utility resource planning 20

IV. This case is not ripe for review 21

Conclusion 22

TABLE OF AUTHORITIES CITED

Cases

Page

Consumers Lobby Against Monopolies, 25 Cal.3d 891 (1979) 18

Dump Truck Owners Assn. v. Public Utilities Commission, 434 U.S. 9 (1977) 21

Energy Reserves v. Kansas Power & Light, 459 U.S. 400 (1983) 19

Exxon Corp v. Governor of Maryland, 437 U.S. 117 (1978) 14

Georgia R. & Power Co. v. Railroad Comm., 262 U.S. 625 (1923) 16

Hughes v. Oklahoma, 441 U.S. 322 (1979) 11, 12

Maine v. Taylor, ____ U.S. ____, 106 S.Ct. 2440 (1986) 11

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 13, 14

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 13

Radio Corporation of America v. United States, 341 U.S. 412 (1951) 16

Toward Utility Rate Normalization v. Public Utilities Commission, 22 Cal.3d 529 (1978) 16

United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938) 16

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 16

P.U.C. Decisions

D. 83-12-068 4

D. 84-08-037 6

D. 85-04-075 ..... 7, 18

D. 85-06-163 ..... 7, 18

D. 85-09-058 ..... *passim*

D. 86-02-033 ..... *passim*

TABLE OF AUTHORITIES CITED

Statutes

	Page
Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 824a-3 *et seq.*, P.L. 95-617, 92 Stat. 3144	3
28 U.S.C. § 1257(c)	2
California Public Utilities Code:	
Section 1709	18
Section 1733	9

Regulations

20 Cal. Admin. Code § 63	8
18 C.F.R. §§ 292.303, 292.304	3

No. 86-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HYDROPOOL AND COGENERATION SERVICES, INC.,
Appellants,

VS.

CALIFORNIA PUBLIC UTILITIES COMMISSION
and PACIFIC GAS & ELECTRIC COMPANY,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

The Appellee, California Public Utilities Commission (the Commission), respectfully moves the Court to dismiss the appeal herein, on the ground that the appeal does not present a substantial federal question, or alternatively, on the ground that the case is not yet ripe for review.

I

The opinions below are correctly stated in the Appellants' (HydroPool's) Jurisdictional Statement.[1]

[1] The Commission's initial majority opinion in Decision 85-09-058 (Sept. 18, 1985) and its subsequent modifying opinion in Decision 86-02-033 (Feb. 5, 1986) are separately reproduced in the Appendix to the Jurisdictional Statement ("J.S.App."), at B and L, respectively. For the convenience of the Court, a single conformed copy of the Commission's decision *as modified* is reproduced in the Appendix hereto ("App."), at A-1—A-27. This copy includes the Administrative Law Judge's Ruling of July 30, 1985 (reproduced at J.S.App. O), which is incorporated by reference in Decision 85-09-058 and was included as an appendix to that decision.

II

Jurisdiction is asserted by HydroPool under Title 28, United States Code Section 1257(2).

III

STATEMENT OF THE CASE

This case is not about discrimination against interstate commerce, nor is it about unlawful abrogation of contracts. Rather, it is about the Commission's ability to implement, pursuant to authority clearly reserved to California by the Federal government, a program encouraging the development of cogeneration and small power production projects. It is also about how this implementation is integrated into energy resource planning in California.

HydroPool petitions this Court for review of a Commission decision which holds that because of transmission constraints in Appellee Pacific Gas & Electric Company's (PG&E's) northern service territory, HydroPool is not entitled to be paid certain prices for electric power it sells to PG&E as long as HydroPool chooses to send that power to PG&E over the bulk transmission line known as the Pacific Northwest-Pacific Southwest 500 kv Intertie (Intertie), rather than over other transmission routes.

The Commission came to this decision after considering evidence of whether transmission over the Intertie could be distinguished from transmission over other constrained transmission lines in PG&E's system. On the basis of this evidence, the Commission determined that transmission over the Intertie would disproportionately displace less expensive energy coming from the Pacific Northwest. The Commission concluded that PG&E's ratepayers should not, without an in-depth review of the matter, have to pay special prices in exchange for that disproportionate displacement. The Commission has initiated a new proceeding for the express purpose of undertaking such a review, which has not yet resulted in a decision. (OII 85-11-008; App. A-28—A-30.)

While the substance of this case is relatively straightforward, its procedural history is complex.

A. Federal Background

With passage of the federal Public Utility Regulatory Policies Act of 1978 (PURPA, 16 U.S.C. §§ 824a-3 *et seq.*, P.L. 95-617, 92 Stat. 3144), electric utilities have been required to purchase available electric energy from small power producers and cogenerators, known as qualifying facilities (QFs) (Sections 201, 210, 16 U.S.C. § 824a-3).[2] For such purchases, electric utilities must pay rates which are just and reasonable to the ratepayers of the utility and which do not discriminate against the QFs. Utilities are also required to interconnect QFs to their transmission systems in order to effectuate the transfer of QF power.

Pursuant to Section 210 of PURPA, the Federal Energy Regulatory Commission (FERC) adopted rules to encourage cogeneration and small power production. (18 C.F.R. §§ 292.303, 292.304.) FERC's rules require that electric utilities purchase electric energy and capacity from QFs at a rate equal to the utility's avoided cost of generating the power itself or purchasing it elsewhere. The implementation of the Section 210 rules is reserved to state regulatory authorities.

This Commission, in furtherance of this reservation, held lengthy public hearings which ultimately resulted in development and adoption of four Standard Offers, or avoided cost contracts, which QFs *within the California electric utilities' service areas* could enter into with those utilities. At a QF's option, it could negotiate with a utility for terms other than those set forth in the Standard Offer contracts; however, if a QF within the service area chose a Standard Offer, the utility was bound by that selection. While interconnection with the utility's transmission system was, in general, a given, none of the Standard Offers contemplated that

---

[2] QFs are entities which "qualify" under PURPA for certain pricing and purchase provisions.

a QF would be seeking to interconnect with any of the utilities' bulk transmission lines.[3] *See* App. A-15.[4]

B. Origins of the Proceeding at Issue

Until recently, the Commission had addressed cost allocations for transmission system upgrades directly attributable to additional QF power on a case specific basis. However, in early 1984 PG&E became aware that serious transmission system constraints had developed throughout its northern service territory.

Based on QF concerns, staff inquires and PG&E representations, the Commission adopted Order Instituting Investigation 84-07-077 (the constraints investigation), the purpose of which was to determine whether and to what extent transmission system constraints had developed in the electric utilities' service areas which would hinder the development of QF power. The constraints investigation included all California investor-owned electric utilities.

---

[3] PG&E's transmission system consists basically of two parts, the area system and the bulk system. The area transmission is composed of 60 kv and 115 kv systems and 230 kv radial lines, which connect the area loads and generation resources to the bulk system. The bulk transmission consists of 230 kv systems and 500 kv lines. The 230 kv systems carry generation to where it is needed. While the 500 kv lines carry some surplus generation which is transferred to the 230 kv systems, they primarily transfer Pacific Northwest economy power from the Oregon border into all parts of California. *See also* note 6, *infra*.

[4] In a decision in an unrelated proceeding, a 1983 PG&E general rate case, the Commission stated: "Before committing transmission resources to QFs, we would want to ascertain whether Northwest power would be displaced as a result." Decision 83-12-068, Dec. 22, 1983, at 331 (unpublished). This illustrates the Commission's early and ongoing concern with the problem of QF displacement of transmission capacity reserved for economy energy. It makes no sense whatsoever to presume the Commission ever intended Standard Offers, which did not allow for negotiation, to apply to such a possibility.

C. The Interim Solution

The decision at issue here, Decision 85-09-058 as modified by Decision 86-02-033 (App. A-1—A-27), closes the constraints investigation. It finds overall that PG&E, but no other California electric utility, has significant constraints in its northern transmission system. The decision also adopts an appropriate mechanism for allocating cost responsibility for system upgrades necessary for PG&E to accommodate QFs in that portion of its system. During the time it will take PG&E to construct the upgrades, estimated by PG&E to be between 5 and 8 years, QF power will be delivered to and purchased by PG&E according to the terms of an agreement called the Interim Solution.

The Interim Solution was negotiated by Commission staff, PG&E and certain QF representatives during the course of the constraints investigation. It established that PG&E must buy 1150 megawatts (MW) of QF electric power at Standard Offer prices during this upgrade period. It also authorized PG&E to depart, if necessary, from its general obligation to dispatch electricity in the most economically efficient manner in order to buy this 1150 MW of power. While any such uneconomic dispatch would increase ratepayer costs, the Commission held the view that the benefits of QF power already identified in past Commission proceedings on this subject justified requiring ratepayers to share the risk of costs incurred due to the Interim Solution.[5]

D. HydroPool's Attempts at Inclusion in the Interim Solution.

The Interim Solution is a temporary measure to enable QF projects to go forward despite the constraints in PG&E's service area. As negotiated by the parties, the Interim Solution's terms were limited to QFs within PG&E's service area. In response to a

---

[5] The Commission's standard in setting QF prices has always been ratepayer indifference; i.e., rates should be the same whether power is supplied indirectly by QFs or directly by the utility. The Interim Solution is an exception to this standard. Even without HydroPool's power, the Interim Solution authorizes an increase in rates if necessary to obtain the benefits of QF power.

motion by HydroPool[6] and two other parties, the Commission removed this restriction in the decision approving the Interim Solution. (Decision 84-08-037; J.S.App. H.) That decision stated that the Commission did not at that time have sufficient evidence to differentiate between QFs within and outside of PG&E's service area; however, the Commission agreed with its own staff and PG&E that:

> "... unlimited amounts of QF deliveries from outside PG&E's service territory could displace large amounts of more economic power. PG&E's ratepayers could suffer large losses if such displacement is permitted." (J.S.App. H at 8.)

HydroPool's motion sought to have 66.2 MW from the 14 projects it represented included in the Interim Solution. Because the projects involved are in Oregon and Washington and are not near any of PG&E's other constrained transmission lines, Hydropool contended that the most economical way for these projects to deliver power to PG&E was through direct interconnection with the Pacific Northwest-Pacific Southwest 500 kv Intertie;[7] consequently, it sought such interconnection under Standard Offer 4 prices.

---

[6] HydroPool is primarily a marketing agent, negotiating with PG&E on behalf of out-of-state developers. At the time of the hearings in the constraints investigation, HydroPool had no financial interest in 12 of the 14 projects, only a minimal 2.5% interest in another one, and a recent partnership interest in the other. (Reporter's Transcript (R.T.) 621.)

[7] The Intertie is a huge, extra high voltage transmission line authorized by Congress to import inexpensive electric power from the Pacific Northwest to California. The primary purpose of the Intertie is to coordinate transactions between utilities, whereas other transmission lines get power from the source of generation to the load center. Its extra high voltage is rated at 500 kilovolts (kv), while other transmission lines are rated at 230 kv or less. All the major investor-owned electric utilities in California, as well as some which are publicly-owned, import relatively inexpensive power over the Intertie from the Pacific Northwest. *See also* note 3, *supra*.

PG&E and a QF trade association petitioned for modification of the Interim Solution to specifically exclude the Intertie on policy grounds. These parties argued that none of the signatories had intended for the Intertie to be included in the Interim Solution because interconnection to the Intertie could result in one-to-one displacement of economy power from the Pacific Northwest. They argued further that such displacement would not be relieved by PG&E's planned transmission upgrades or new transmission lines. The Commission declined to exclude the Intertie at that time, but granted limited rehearing on the issue, to be consolidated with the remainder of hearings in the constraints investigation.

During the pendency of those hearings, HydroPool tried to tender to PG&E long-term contracts for its projects under Standard Offer 4 which PG&E refused to sign. In April, 1985 in a totally different proceeding, the Commission prospectively suspended authority for Standard Offer 4 contracts (Decision 85-04-075; J.S.App. J). The basis for this action was that the prices originally established in Standard Offer 4 now exceeded the utilities' avoided costs and thus imposed unreasonable costs on ratepayers. Although not mentioned in its Jurisdictional Statement, HydroPool petitioned for modification of that decision, seeking to have its Standard Offer 4 tender offers exempted from the suspension order. (App. A-31—A-35.) Two months later, the Commission held that Standard Offer 4 contracts properly tendered by a QF prior to the suspension order were binding. (Decision 85-06-163, the "Orphan Contracts" decision; J.S.App. K.) However, the Commission also held that its decision on PG&E's motion to exclude the Intertie would determine the ability of HydroPool to enter into the contracts it had attempted to tender to PG&E. (*Id.* at 37, 44, 47.) The Commission did not reach the issue of whether those contracts had been properly tendered.[8]

---

[8] PG&E consistently maintained that those contracts had not been properly tendered because, *inter alia*, they were not appropriate for out-of-area projects, were not properly completed, and HydroPool had no standing to tender them until it was ruled eligible under the Interim Solution.

Meanwhile, the Administrative Law Judge (ALJ) in the instant case issued a ruling on July 30, 1985 (App. A-20—A-27), which concluded that the record contained sufficient information for the Commission to distinguish between the Intertie and other constrained transmission lines for purposes of the Interim Solution. The ALJ found that direct interconnection to the Intertie 1) would displace economy power on a one-to-one basis, whenever such power is available to fill PG&E's capacity entitlement; moreover, PG&E has no flexibility to reduce this displacement, as it does with other transmission lines, and the planned upgrades will not ease the situation for the Intertie; and 2) would reduce PG&E's available firm capacity on the Intertie for negotiating purposes with Northwest utilities. He also found that PG&E has never accepted firm QF deliveries on the Intertie without price concessions relative to the price of economy power, nor has it ever represented otherwise to any QF. The ruling further noted that the Commission could, in the alternative, decide to include the Intertie in the Interim Solution *as a matter of policy*.[9]

HydroPool petitioned for urgent relief, requesting that the Commission choose the latter alternative. None of the arguments which HydroPool later raised in its application for rehearing to the Commission, its petition for writ of review to the California Supreme Court, or its appeal to this Court, was raised in its petition for urgent relief.

E. The Commission's Decision

After completion of the consolidated generic hearings and the rehearing on PG&E's Intertie exclusion motion, the Commission issued Decision 85-09-058, the decision at issue here. That

---

[9] HydroPool contends the ALJ, finding these differences "insufficient to justify a recommendation that the Commission exclude HydroPool from the terms of the interim solution," simply forwarded his results to the Commission without ruling one way or the other. (J.S. at 36-37.) This inaccurately characterizes the ALJ's position. *See* App., A-24—A-27. Moreover, Rule 63 of the Commission's Rules of Practice and Procedure, reproduced at App. 36, provides that an ALJ may not issue rulings on final determinations of proceedings. The ALJ did exactly what he was authorized to do.

decision adopted and incorporated the ALJ's July ruling by reference (App. A-14), and concluded based on the record that PG&E's proposed exclusion of the Intertie was a reasonable distinction among its constrained transmission lines which did not result in unlawful discrimination against a class of QFs. The decision also ordered that another investigation be initiated into the broader question of out-of-service area QF power "in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers," including whether and when to make Standard Offers available to such QFs. (App. A-15.)

HydroPool filed a timely application for rehearing, to which PG&E and two other California electric utilities responded. On January 16, 1986, there having been no Commission action on its application for rehearing, HydroPool decided to deem it denied as permitted by California Public Utilities Code Section 1733,[10] and filed a petition for writ of review with the California Supreme Court.

On January 29, 1986, a prehearing conference was held in the new investigation. HydroPool's counsel stated he was not concerned about the scheduling of the OII because in his view the issues concerning HydroPool's projects are not issues in the OII and would not be affected by it. (R.T. 3)

On February 5, the Commission denied HydroPool's application for rehearing in Decision 86-02-033, which modified and clarified Decision 85-09-058 but did not change the result.[11] On July 30, 1986 the California Supreme Court summarily denied HydroPool's petition for writ of review, thereby rejecting HydroPool's claims on the merits, without the necessity of hearing further argument.

---

[10] Section 1733 is reproduced at App. A-36.

[11] HydroPool implies, by its virtual disregard of Decision 86-02-033, that once a party chooses to deem its application for rehearing denied, Section 1733 precludes further Commission action. HydroPool provides no authority for this position, nor does any exist.

ARGUMENT

I

HYDROPOOL'S COMMERCE CLAUSE ARGUMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

HydroPool asserts the Commission's action falls within the category of state regulations that "affirmatively discriminate against interstate commerce" (J.S. 41), because "the ultimate effect of the Commission's ruling is to exclude out-of-state QFs from participating in sales of power to PG&E on the terms and conditions which are simultaneously being offered to QFs located in California." (*Id.* at 42.) HydroPool's argument fails on several counts.

The Commission does not create a distinction between in-state and out-of-state QFs. Decision 85-09-058 excludes from the Interim Solution QFs outside of PG&E's service territory connecting with the Intertie north of Round Mountain, whether or not those QFs are in California. The exclusion does not rest on HydroPool's geographical status, but on the type of transmission line to which HydroPool wants to interconnect, and the price to be paid for HydroPool's power.

Nor has the Commission precluded HydroPool from selling to the Northern California market by means of the Intertie. Nothing in the Commission's order prevents HydroPool from negotiating a contract with PG&E. In fact, PG&E has offered HydroPool an arrangement through an area transmission line, as opposed to the larger Intertie, which HydroPool has rejected for its own business reasons. (R.T. 820-821, 857-858.) HydroPool has, however, been precluded from participation in the Interim Solution at the Standard Offer 4 price, for legitimate reasons which are supported by the evidence in this case. But this does not amount to preclusion from the Northern California market.

Moreover, the Commission has not interfered with competition between intra- and interstate commerce. No California QF would be displaced by HydroPool's power. The Commission made clear that the 66.2 MW HydroPool hoped to deliver to PG&E could be

added to the Interim Solution, should HydroPool be found to be an appropriate participant. Nothing would be subtracted from the terms of that agreement. The only subtraction would be the Northwest economy power which HydroPool would be displacing.

Finally, the Commission's order in no way interferes with the movement of electricity in interstate commerce. Energy will continue to flow from the Pacific Northwest down the Intertie in exactly the same amounts, whether or not HydroPool's energy is included. But while HydroPool may have a right under PURPA to contribute to that energy flow, it has no constitutionally protected right to be a part of that flow at a price which *it and it alone* dictates, over a transmission line which *it and it alone* chooses.[12]

A. HydroPool's Factual Analysis Does Not Support a Finding of Discrimination Against Interstate Commerce

HydroPool asserts the Commission's action is the kind of affirmatively discriminatory legislation identified in *Maine v. Taylor*, ___ U.S. ___, 106 S.Ct. 2440 (1986), and struck down in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), which invokes the strictest scrutiny of asserted local benefits and nondiscriminatory alternatives. HydroPool, however, fails to satisfy the threshold test: it does not demonstrate either that the Commission's decision affirmatively discriminates against interstate commerce, or that it discriminates in practical effect. *See, e.g., Hughes v. Oklahoma, supra*, at 336.

HydroPool first argues that the Commission "concedes" it is discriminating against interstate commerce by "characteriz[ing] [in Decision 85-09-058] the petition to exclude HydroPool as presenting 'the general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection' with the transmission lines of California utilities." (J.S. 41.)

---

[12] The terms and conditions of HydroPool's participation are issues in the new investigation which have not yet been resolved; see App. A-28—A-30.

HydroPool not only takes this language out of context; it also ignores completely the language of Decision 86-02-033, which modifies Decision 85-09-058 to clarify the Commission's intent. Only after stating that HydroPool is not being excluded from the Intertie, and discussing the evidentiary basis as to why HydroPool will not be allowed to pay Standard Offer 4 prices during the pendency of the Interim Solution if it insists on delivering power over the Intertie, does Decision 85-09-058 as modified by Decision 86-02-033 address the more general problem:

> "Finally, we do not reach the larger question of whether, and, if so, under what conditions, QFs ever should have access to the Intertie under a Standard Offer type of option. Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. . . .
>
> "By examining the problems of how to deal with out-of-state QFs in a generic proceeding, we will avoid the risk of reaching a conclusion on these issues based on the necessarily incomplete record and limited perspective raised in the current proceeding in which the focus was exclusively on HydroPool's projects. . . ." (App. A-15, A-16).

HydroPool secondly asserts that the choice of Round Mountain as the Intertie connection point above which no QF will be able to get Standard Offer 4 prices discriminates in practical terms against out-of-state QFs, because Round Mountain is virtually at the Oregon border. (J.S. 25, 42.) This assertion is equally meritless. As perusal of a map of California will show (*see* J.S. App. U), Round Mountain is at least 100 miles south of the border. Three entire California counties are north of this location. The point is that regardless of geographical location, *any* QF insisting on interconnection with the Intertie north of Round Mountain would have been denied Standard Offer 4 prices just as HydroPool was. Moreover, any QF, including HydroPool, north of Round Mountain and choosing to interconnect with PG&E's

transmission system through a route other than the Intertie could have taken advantage of Standard Offer 4 prices.[13]

In asserting that Round Mountain is the only "practical" point of entry for out-of-state QFs, HydroPool is really saying that Round Mountain is the most economic point for entry of its projects. But it is certainly not the Commission's responsibility to ensure that a private entrepreneur is able to do business in the most profitable way.

B. HydroPool's Legal Analysis Asserts the Wrong Test

Because HydroPool fails to meet the threshold test of demonstrating that the Commission's action affirmatively discriminates against interstate commerce, this action does not invoke strict scrutiny of local benefits and nondiscriminatory alternatives, but must turn to the question of whether any burden imposed in interstate commerce is "clearly excessive in relation to the putative local benefits." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Here the State, through this Commission, has a legitimate interest in protecting PG&E's supply of economy energy and PG&E's negotiating posture for that energy, as part of its more general responsibility to ensure that California's ratepayers pay the lowest possible rates for power. It also has an interest, and, in fact, a responsibility under PURPA, to ensure that the QF industry will continue to exist during this temporary period when PG&E is making the necessary upgrades in its transmission system. It has yet a further interest in seeing that the rules it has enacted *pursuant to PURPA*[14] are applied in a reasonable and

---

[13] In fact, PG&E has a second connection to the Pacific Northwest other than the Intertie. (R.T. 390-392.) HydroPool rejected PG&E's offer to negotiate a contract for HydroPool's power through an arrangement other than the Intertie. (R.T. 820-821, 857-858.)

[14] Despite HydroPool's inferences to the contrary, PURPA does not address either the out-of-state QF situation, or the situation where a QF wants to interconnect with a bulk transmission line.

expeditious manner, and that any exceptions to those rules are carefully examined before being authorized.

In contrast, any interference with interstate commerce is incidental and minimal. In order to send its power to PG&E over the Intertie, HydroPool must either wait to see what the Commission will decide in its recently instituted investigation, or must be willing to negotiate a lower price or some other alternative with PG&E now. Its other choice is to enter the Oregon and Washington markets as it seeks to do here, i.e., on its own terms. While HydroPool clearly prefers the California market, it has not shown a constitutionally protected right to enter that market. As this Court has stated in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978), the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." A nondiscriminatory regulation furthering substantial state purposes is not invalid "simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery, supra*, 449 U.S. at 474.

In the case at bar, the Commission's order has not even caused a shift from inter- to intrastate industry. HydroPool's projects have never been involved in the interstate market. The Commission has yet to determine generic rules for that market. Until that task is completed, HydroPool can properly be restricted to entering the interstate market under terms reflecting the circumstances of its own situation.

In fact, HydroPool does not seriously dispute the substantiality of any of the Commission's above-described interests.[15] Rather,

---

[15] HydroPool postulates its own notion of what the Commission might assert as "legitimate local purposes," and attempts, through selective citation of a number of prior Commission decisions, to show that the Commission itself has rejected their "legitimacy in the context of its adjudications of the rights of California QFs." (J.S. 45: *see also, id.* at 43-44.) This approach has no merit.

First, it misstates the above-discussed "local purposes" fostered by the Commission's action. For example, in D.85-09-058, the Commission was not concerned about the burdens that wheeling of HydroPool's

HydroPool's only serious basis for challenge is its allegation that the record does not support the Commission's finding that deliveries of power to the Intertie above Round Mountain would cause a proportionately greater displacement of economy energy than would deliveries below that point, because the latter could be diverted to other lines during periods of overload. (J.S. 45-46.) In taking this position, HydroPool is, in effect, asking this Court to review the evidence and determine whether it is sufficient to support the Commission's findings.

The Commission's findings concerning displacement were made after hearing evidence from both PG&E and HydroPool. The ALJ's ruling, which the Commission incorporated by reference in Decision 85-09-058, discussed that evidence in detail. The evidence was conflicting. The Commission drew different conclusions from that evidence than HydroPool hoped it would.[16] But such is wholly within the Commission's prerogative as trier of fact. "When conflicting evidence is presented from which con-

---

power would impose on PG&E. Secondly, it misstates the facts. The Commission did not "require" PG&E to continue accepting QF power during the upgrade period; PG&E stipulated with the Commission staff and QF representatives to do so in the Interim Solution. Finally, as stated by HydroPool itself, those prior Commission decisions dealt with what prices *California QFs* should be paid, in entirely different circumstances than the case at bar. No serious transmission constraints had yet been recognized, and no one at the time of any of those prior decisions contemplated that direct interconnection to the Intertie would be proposed. (*See* App. A-15.)

[16] The conclusions HydroPool hoped the Commission would come to appear primarily at pages 32-36, 46 of HydroPool's Jurisdictional Statement. The Commission did not agree, concluding, rather, that the record clearly demonstrated that HydroPool's projects would displace economy imports over the Intertie for a longer period and to a much greater degree, both qualitatively and quantitatively, than other QFs under the Interim Solution. *See* Decision 85-09-058, Finding 9, Conclusion 3 (App. A-17, A-18); ALJ Ruling 2-9 (App. A-20—A-27); *see also* specific exhibits and cross examination of PG&E witnesses Malinowski (*see, e.g.*, Ex. 20; R.T. 371, 389) and Kerler (*see, e.g.*, Ex. 1; R.T. 36-37), and cross examination of HydroPool's witness Weatherwax (R.T. 239, 244-245, 258, 259, 291-292).

flicting inferences can be drawn, the commission's findings are final." *Toward Utility Rate Normalization v. Public Utilities Commission,* 22 Cal.3d 529, 538 (1978).

It has long been the rule that this Court, in considering the question of sufficiency of evidence to support an administrative order, must and does rely largely upon a reviewing court's conclusion. *Radio Corporation of America v. United States,* 341 U.S. 412, 415 (1951); *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 491 (1951). This Court will normally not interfere with findings of fact of a state utilities commission which have been approved by a lower court. *United Gas Public Service Co. v. Texas,* 303 U.S. 123 (1938); *Georgia R. & Power Co. v. Railroad Comm.,* 262 U.S. 625 (1923). Here, the California Supreme Court has affirmed the Commission's interpretation of the evidence.[17] HydroPool has given this Court no good reason to interfere with that judgment.

Finally, should the Court determine that a stricter standard of review must be undertaken in this case, the Commission submits that the so-called "nondiscriminatory alternatives" proposed by HydroPool are not acceptable. Those alternatives would, indeed, amount to special treatment for a QF seeking what has never been accepted before by either PG&E or this Commission, and is in no way required by PURPA: direct interconnection with the Intertie, with frequent one-to-one displacement of economy power which has already been subscribed to by Pacific Northwest utilities, at Standard Offer 4 prices.

Moreover, the alternative proposed by PG&E, that HydroPool connect under the Interim Solution to an *area* transmission line instead of the Intertie, was rejected by HydroPool for its own business reasons. (R.T. 820-821, 857-858.)

The Commission has, however, provided the most nondiscriminatory alternative of all, *i.e.,* the new investigation into the rights and obligations of out-of-service area and out-of-state QFs. (App. A-28—A-30.)

---

[17] HydroPool correctly points out that this affirmation is a decision on the merits. J.S. 2, 40.

II

HYDROPOOL'S CONTRACT CLAUSE ARGUMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

HydroPool's Contract Clause argument is, in essence, that since the state of the law in this area is unsettled, this Court should use the instant case to clarify matters. This argument assumes the existence of valid contracts which the Commission has allegedly wrongfully abrogated.[18] Review of the record demonstrates that contrary to this assumption, HydroPool never had valid contracts in the first instance.

HydroPool erroneously asserts that it had made valid Standard Offer 4 tenders to PG&E before April 17, 1985, the date of the Commission's Orphan Contracts decision. Correspondence with PG&E shows that HydroPool tried on several occasions to get PG&E to commit itself to HydroPool's projects, all without success. (Ex. 13; Ex. 19; Ex. 19b.) Anticipating imminent Commission suspension of Standard Offer 4, HydroPool finally delivered several such contract tenders to PG&E's offices. No evidence exists that PG&E officials had ever represented to HydroPool that Standard Offer 4 contracts were appropriate for its projects, and, in fact, HydroPool itself recognized that its projects were in some ways unique and would thus require special contract provisions. (Ex. 19b, referring to earlier letter to PG&E from HydroPool.) After this tender, PG&E wrote back to explain the problems with the contracts apart from PG&E's basic position that the Interim Solution did not include any QFs wanting to interconnect with the Intertie. (*Id.*)

---

[18] The "contracts" in this case are not, of course, traditional agreements reached by two parties bargaining at arm's-length. Rather, the Standard Offer 4 contract has been devised by this Commission as a "form" contract establishing the prices PG&E must pay QFs under certain conditions. If such a QF meets the requirements for and actually tenders such a contract, it must be accepted by PG&E. The Commission in Decision 85-09-058 held that HydroPool did not have the right to enter any Standard Offer 4 contracts under the interconnection terms it insisted on.

Shortly thereafter, the Commission's Decision 85-04-075 suspending Standard Offer contract tenders was issued. (J.S.App. J.) HydroPool petitioned for modification of that decision, requesting the Commission to declare that HydroPool's tenders were exempt from the suspension. (App. A-31—A-35.) Since PG&E had refused to finalize the tenders, HydroPool argued it would be unfair for the cut-off date to apply to its obviously incomplete tenders. The subsequent Orphan Contracts decision, which clarified that in general, all tenders which were completed by the cut-off date would have to be honored, specifically provided that the Commission's resolution of PG&E's petition to modify the Interim Solution to exclude interconnections with the Intertie would determine HydroPool's ability to enter into Standard Offer 4 tenders. (Decision 85-06-163 at 37, 44, J.S.App. K.) HydroPool never petitioned for rehearing of the Orphan Contracts decision, thus that decision is final and is *res judicata* here. California Public Utilities Code Section 1709;[19] *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 902 (1979).

Subsequent to the issuance of Decision 85-09-058, HydroPool has taken the opposite position on the Standard Offer 4 issue. It argues before this Court, as it did in its application for rehearing to the Commission and its petition to the California Supreme Court, that its tenders were valid as of the cut-off date; thus both PG&E and the Commission must deem those tenders to have become valid Standard Offer 4 contracts.

This is a disingenuous assertion. First, in filing its petition for modification, HydroPool as much as admitted that it had no valid Standard Offer 4 tenders at the time of the cut-off date. Otherwise that filing, which was not made in the alternative, makes no sense whatsoever. Secondly, while PG&E asserts just as vigorously that HydroPool's tenders were not substantively acceptable, this question has never been reviewed by the Commission. Such would have been appropriate if the Commission had denied PG&E's petition to modify; however, the Commission granted that petition, and in so doing found that HydroPool had no ability

---

[19] Section 1709 is reproduced at App. A-36.

to enter into such contracts at all, without regard to when they had been tendered or what PG&E's response to them had been.

It follows from the above that whatever the merits in general of its dissertation on the Contract Clause, HydroPool's argument that this case presents the "ideal vehicle" for the Court to clarify its position on that Clause is completely without merit.[20]

---

[20] Concerning that analysis, *Energy Reserves v. Kansas Power & Light*, 459 U.S. 400 (1983) states, at 411: "The threshold inquiry is 'whether the law has, in fact, operated as a substantial impairment of a contractual relationship.' " As the discussion *supra* shows, no contractual relationship existed; HydroPool had merely an expectation of such a relationship which never came to fruition. However, assuming *arguendo* the existence of such a relationship, the *Energy Reserves* analysis provides no additional help to HydroPool. That decision, in assessing the degree of impairment of the contractual relationship, next asks whether the industry has been regulated in the past. *Id.* Certainly the QF industry, though not regulated like the utility industry, has been regulated in some areas, although it is true that QFs like HydroPool, who wanted individual treatment like direct interconnection with the Intertie, were never included in any of the Standard Offer arrangements but were left to negotiate "nonstandard" contracts with the utilities.

If impairment of the contractual relationship is found, the State must then assert a "significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem." *Id.* at 411-412. Again, assuming *arguendo* that impairment is found, certainly the Commission's interests as set forth in Section I.b of this Motion should amply satisfy this prong of the test. Finally, the Court will inquire as to whether the adjustment of the parties' rights and responsibilities is reasonable and appropriate, given the public purpose asserted. *Id.* This prong, too, is satisfied. HydroPool was offered other opportunities which it rejected, solely for business reasons; moreover, its rights are yet to be adjudicated as part of the Commission's investigation into the broader questions raised by out-of-service area and out-of-state QFs. Thus even should a contract be found to have existed and to have been impaired, HydroPool's contract rights have not been unlawfully abrogated under the standards set forth in *Energy Reserves*. The Commission submits that despite the views of certain scholars as to the continuing viability of the Contract Clause, HydroPool simply has no case.

III

GRANTING THE RELIEF HYDROPOOL SEEKS WOULD UNDERMINE CALIFORNIA'S AUTHORITY UNDER PURPA AND WOULD DECIMATE STATE UTILITY RESOURCE PLANNING

HydroPool seeks to magnify the significance of this case by contending the Commission's action threatens to destroy the federal small power preference program created by PURPA. The exact opposite is true. The Commission, by its action in excluding the Intertie from the Interim Solution, has ensured that the federal program can continue during a period of severe transmission constraints for one of the major electric utilities in California. The Commission's action also ensures that the rules the Commission implements under its delegated PURPA authority are enacted in an orderly fashion, after careful examination of all the relevant factors, rather than only the circumstances affecting one QF. Finally, it ensures that the PURPA rules will not result in unreasonable rates to California's ratepayers, and that those rules will be properly integrated into utility resource planning in this State.

Granting HydroPool the relief it seeks would have just the opposite impact. California's ability to maintain control over all of these important responsibilities would be seriously undermined if it is determined that a QF in HydroPool's position can single-handedly dictate where its power can enter a utility's system, and at what price. The Commission would lose control over its PURPA rules, which have been over five years in the making and which are still evolving. Moreover, it would lose control over setting reasonable rates and utility resource planning, if economy energy coming into the State can be supplanted by more expensive QF power at a QF's whim. The Court should refuse to partake in such a result.

IV

THIS CASE IS NOT RIPE FOR REVIEW

This appeal should be dismissed for want of a substantial federal question. However, in the alternative, the Commission submits that the case is not yet ripe for review, because of the pending administrative proceeding which may well affect HydroPool's rights in this matter. The issues in dispute in the instant case, *i.e.*, the conditions of purchase and the prices to be paid to out-of-service area and out-of-state QFs wishing to deliver power directly over the Intertie, will be considered in the Commission's OII 85-11-008, the investigation instituted in November, 1985 in response to the concerns of HydroPool and others. (App. A-28—A-30.) This investigation will constitute the initial determination of the proper price to be paid for such power, and will decide under what conditions, if any, a Standard Offer type of arrangement should be made available to QFs in HydroPool's situation. These issues have in no way been foreclosed by Decision 85-09-058, for HydroPool or for any other QF.

This Court has previously rejected without prejudice an appeal from a decision of this Commission under similar circumstances, where further administrative proceedings "may remove the basis for, or significantly alter the nature of, appellants' constitutional attack." *Dump Truck Owners Assn. v. Public Utilities Commission*, 434 U.S. 9 (1977). Should this Court not be prepared to dismiss this appeal for want of a substantial federal question at this time, the Commission asks that in the alternative, the appeal be dismissed as not being ripe for review.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss HydroPool's claim for want of a substantial federal question. In the alternative, the appeal should be dismissed as not being ripe for review.

Respectfully submitted,

JANICE E. KERR
HECTOR ANNINOS
ANNE K. MESTER
Attorneys for Appellee
the California Public
Utilities Commission

November 28, 1986

Appendix A

[Conformed copy of Decision 85-09-058, filed September 18, 1985, as modified by Decision 86-02-033, filed February 5, 1986.]

DECISION 85-09-058 SEPTEMBER 18, 1985
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	I.84-04-077 (Filed April 18, 1984)

(See Decisions 84-08-037 and 85-01-038 for prior appearances.)

Additional Appearances

Ann P. Cohn, David N. Barry, III, and Jennifer Moran, Attorneys at Law, for Southern California Edison Company, Respondent.

Graham & James, by *James Squeri,* Attorney at Law, for Union Oil Company of California; *Neal A. Johnson,* for California Waste Management Board; *Robert Logan,* for himself; *Alicia Torre,* for International Power Technology; and *Margaret Rueger,* for U. S. Windpower, Inc.; Interested Parties.

OPINION

I. *Summary*

By this order, we close an investigation into transmission limitations in utility systems which may affect the development of Qualifying Facilities (QF). We find that Pacific Gas and Electric Company (PG&E) may have significant constraints in its northern system. The other two utilities, Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E), should not have significant transmission constraints.

II

BACKGROUND

On April 18, 1984, the Commission issued Order Instituting Investigation (I.) 84-04-077 to examine alleged transmission constraints in PG&E's transmission system which would affect QF development. The Commission also wanted to assess the extent of any limitations in other utilities' transmission systems which would affect QF development.

The respondent utilities filed statements of anticipated limitations on their bulk and area transmission systems over the next ten years which may affect QF development. In these statements, only PG&E predicted that it would have significant constraints in its northern transmission system.

After submission of the utilities' statements, the Public Staff Division (staff) held several workshops at which an interim solution was developed for PG&E's northern transmission system, a milestone procedure for QF development was formulated, and transmission cost allocation approaches were discussed. (See Decision (D.) 84-08-037 and D.85-01-038.) The participants in the staff's workshops were able to resolve several issues and thereby reduce the need for formal hearings.

Hearings were held from April 8-12, 1985 on three subjects: utilities' transmission constraints, cost allocation approaches, and access to the Pacific Northwest-Pacific Southwest 500 kilovolt (kV) Intertie (Intertie) under the terms of the interim solution (see Appendix A). PG&E, Edison, SDG&E, Santa Fe Geothermal, Inc. and Ultrasystems, Inc. (Ultrasystems), Independent Energy Producers (IEP), Cogeneration Services, Inc.-HydroPool (HydroPool), and staff presented witnesses. Concurrent briefs were filed by May 24, 1985.

III
Transmission System Limitations

A. PG&E's Transmission System

1. Transmission Constraints

James H. Malinowski, PG&E's Chief Transmission Planning Engineer, testified that transmission capacity is not currently available in some areas of PG&E's northern system. Malinowski stated that from 1980 to 1984, the megawatts (MW) of signed QF contracts increased from 204 MW to 6,593 MW. Malinowski asserted that this unexpected increase in QF power exceeded available transmission capacity in its northern system.

According to Malinowski, the availability of transmission capacity is dependent on existing and future load levels as well as existing and future generation. In PG&E's northern area, generation consists of area hydro, imports, geothermal, Rancho Seco, other entities, and QFs. This anticipated generation will exceed the expected load during certain hours of each year for the next ten years.

In PG&E's southern area, the company is monitoring the development of large enhanced oil recovery projects to determine if capacity constraints will emerge.

Malinowski sponsored the following table showing that the northern system already has a resource-load imbalance:

Load, Excluding System Line Losses (MW)
and
Resources, Excluding Northwest Import (MW)

Main Area	Installed Capacity	Typical Resources On Line	Peak Load	Surplus Resources	Resources Needed to Meet Load
Northern	8,892	7,290	5,328	1,962	—
Bay Area	4,670	2,232	5,540	—	3,308
Southern	7,290	5,366	5,062	304	—

Northern Area includes SMUD and Humboldt, Shasta, Colgate Drum, De Sabla, North Bay, Sacramento, and Stockton Divisions.

Bay Area includes San Francisco, East Bay, and San Jose Divisions.

Southern Area includes MID, TID, and San Joaquin and Coast Valleys Divisions.

Malinowski stated that most of the northern area's 1,962 MW of surplus resources will be transmitted to meet Bay Area load. According to Malinowski, this transfer of power will fully load some bulk transmission lines. As a result, any additional QF power in the northern area would cause these transmission lines to overload.

PG&E has conducted a study to determine which lines would be overloaded during the summer peak and the spring partial peak periods. This study showed that the existing bulk transmission system had no available capacity for firm deliveries of QF power. Malinowski testified that under normal conditions the following 230 kV lines and 500 kV capacitors would be overloaded:

a. Gold Hill-Tesla

b. Rancho Seco-Tesla

c. Bellota-Tesla Nos. 1 and 2

d. Tracy-Tesla Nos. 1 and 2

e. Vaca-Dixon-Contra Costa Power Plant (CCPP) Nos. 1 and 2

f. Vaca-Dixon-Moraga Nos. 1 and 2

g. Round Mountain-Table Mountain 500 kV series capacitors

Malinowski also testified that constraints exist in several area transmission systems within the northern system. In most of these areas, which are rural or suburban, the load and expected load growth is small compared to urban areas. Consequently, existing transmission lines are of relatively low capacity. In addition, the area generation often exceeds the area load. The following table shows the available transmission capacity in the northern areas:

Sub Area	Load (MW) Maximum (A^1)	Load (MW) Minimum (A)	(MW) Existing and Planned Generation (B)	(MW) Maximum Export (C)=(B-A)	(MW) Existing Transmission Capacity (D)	(MW) Available Transmission Capacity (E)=(D-C)	(MW) Potential QF Generation**** Allocated	(MW) Potential QF Generation**** Wait List
Humboldt Division	130	40	128	88	88	0-90*	90.0	136.5
Includes Trinity County—Shasta	19	5	106	101	106	5	4.5	40.0
Pit 1 System	3	1	7	6	16	10	27.0	0.5
Cedar Creek 60 kV Area	3	2	38	36	36	0	4.5	4.0
Battle Creek 60 KV Area	75	34	78	44	84	40	70.0	20.0
Caribou 60 kV Area	0	0	339**	339	390	51		
Feather River Area	40	16	38	22	37	15	0.5	63.0
Paradise 60 kV Area	52	17	417	365***	365	0	20.5	12.0
Colgate 60 kV Area	220	132	245	113	113	0	20.0	59.0
North Bay North	865	519	2,132	1,613	1,613	0	382.0	862.5
North Bay South	4	2	174	172	172	0	20.0	7.3
Drum Division								

* 90 MW available if Humboldt Bay Units 1 and 2 are backed down.

** Includes 44 MW of import from the Caribou 60 kV area.

*** B - A^1

**** List as of February 8, 1985.

2. Transmission Upgrades

Malinowski testified that two groups of transmission upgrades to its bulk transmission system have been identified. The first group will provide transmission carrying capability for an additional 1,150 MW of QFs, the QFs interconnecting under the terms of the interim solution. (See D.84-11-123 modifying D.84-08-037.) These bulk upgrades, their estimated cost, and expected operating dates are as follows:

Potential Bulk Transmission Upgrades
For First 1,150 MW of Added QF Power

	Estimated Cost (in Million of 1984 Dollars)	Expected Operating Date
String a second 230 kV circuit from Gold Hill to Tesla	3.4	March 1988
Add about 500 MVARS of shunt capacitors	8.0	June 1989
Build an additional 230 kV DCTL from Bellota to Tesla	18.2	December 1989
Rebuild the Vaca-Dixon-Contra Costa 230 kV DCTL	37.2	December 1990
Rebuild the Vaca-Dixon-Moraga 230 kV DCTL	55.4	June 1991
Add second 500/230 kV transformer bank at Tesla	15.5	June 1992
Total	137.7	

The second group of bulk upgrades will accommodate the transmission requirements of an additional 2,000 MW of QFs power in the northern area. Approximately 2,000 MW of QFs are on a PG&E waiting list for transmission capacity in the northern area. These upgrades and their estimated cost are as follows:

Potential Bulk Transmission Upgrades
For Another 2,000 MW of Northern QF

	Estimated Cost (in Millions of 1984 Dollars)
Upgade Round Mountain series capacitors	$ 26.1
Build new Table Mountain—Telsa 500 kV line and install series capacitors and transformer banks at both ends	154.8
Replace conductors of Weber-Tesla section of the Bellota-Telsa 230 kV DCTL with SSAC	7.5
Add two circuits of two 3,500 kcmil cables at the underground section of Castle Rock Junction-Lakeville line	5.4
Rebuild the Lakeville-Vaca-Dixon 230 kV DCTL with 2-1113 kcmil AAL conductors	27.8
Total	$221.6

Finally, Malinowski described planned area transmission upgrades as follows:

Area Reinforcements

Area	Transmission Capacity (MW) Available	To Be Added	Estimated OD	Cost* $ x 1000	$/Kilowatt (kW)**
Pit 1	5	100	1988	9,000	90
Cedar Creek	10	38	1987	4,400	116
Battle Creek	0	25	1987	2,000	80
Caribou 60 kV & Feather River	40	100	1990	13,500	135
Paradise	15	50	1987	3,000	60
Colgate	0	30	1988	2,500	83
North Bay North	0	80	1988	5,500	69
North Bay South	—	—	—	—	—

* In 1985 dollars.

** $/kW of area transmission capacity added—excludes $119/kW of bulk transmission costs.

U. S. Windpower, Inc. (USW) in its brief stated that PG&E has provided incomplete information on transmission constraints in the Altamont Pass area. Malinowski during cross-examination testified that there are transmission contraints in this area. He further stated there is a waiting list of at least 700 MW of QFs desiring transmission capacity in this area.[1] USW observes that PG&E has not provided examples of planned upgrades which will relieve these constraints in Altamont Pass.

B. Edison's Transmission System

Edison does not expect to have any transmission limitations during the ten-year period ending in 1994 that will constrain QF development. E. M. Helm, Senior Planning Engineer, testified that the company's Fall 1984 Generation Resource Plan was 3,250 MW of renewable and alternate resources for the period 1985-1994. Helm stated that Edison has planned to develop its transmission system to accommodate these QF facilities. Accordingly, Edison does not expect any major difficulty in integrating QFs into its resources.

C. SDG&E's Transmission System

SDG&E also does not anticipate any bulk transmission constraints in its service territory which will limit QF development over the next ten years. Ronald Erdman Busher, Supervisor of Transmission Planning, identified two areas which have potential limitations: Boulevard and Warner Springs. However, Busher further testified that the actual QF development in these two areas will not surpass the line capacity in these areas. Thus, SDG&E believes there also are no significant area transmission limitations in its system.

---

[1] By letter dated July 3, 1985, counsel for PG&E informed the administrative law judge (ALJ) that certain transmission lines in the Altamont Pass area have been "uprated" to accommodate most of the QFs on the waiting list.

IV
Transmission Cost Allocation

After studying the utilities' evaluations of their transmission systems, the parties examined transmission cost allocation approaches. The staff held a workshop to see if the parties could agree upon a basic allocation of most transmission upgrade costs to utilities and their ratepayers. General agreement was reached; however, minor differences arose during the hearings.

The staff, through its witness Julian Ajello, stated that utilities have the responsibility for anticipating the growth of QF resources. Utilities also must plan and construct adequate transmission capacity. Ajello emphasized that QFs are a significant portion of utility resource plans and therefore must be considered in utility transmission plans. Ajello further stated that the cost of transmission capacity which has multiple purposes is a legitimate ratepayer expense. Thus, staff believes the cost of transmission lines or upgrades should be allocated to ratepayers unless the transmission facility does not serve multiple purposes.

PG&E believes that the reasonable cost of nondedicated facilities necessary to take QF power should be paid by ratepayers. However, PG&E's witness Malinowski asked the Commission for guidance on the reasonableness of a transmission facility cost. Malinowski suggested that a cost cap of about $150/kW could be used as a guideline for determining reasonable area transmission costs. Malinowski explained that the company really was seeking Commission approval of the concept of a cap as a guideline and not for the fixing of a particular cap.

Edison urges the Commission to approve the company's current allocation under which the QF pays for transmission facilities which are directly related to or required by QFs. If an upgrade is not directly required by or solely beneficial to a QF, the QF has no cost reponsibility. In other words, as Edison's witness Helm stated, if a transmission facility has system benefits, then the QF need not pay for it.

SDG&E asserts that its analysis of a transmission facility's cost is the same for QFs, all other resources, and customers. SDG&E analyzes the following factors for each transmission line:

1. Future system growth needs
2. System security and reliability
3. Emergency support
4. Economy energy access
5. Transmission losses
6. Transfer capability
7. Firm resources at system peak conditions
8. Cost effectiveness

SDG&E believes that each transmission line or upgrade must be evaluated under the above criteria. SDG&E submits there is no need for the Commission to change the company's existing transmission planning method.

IEP asserts that it is the utility's obligation to plan and to build tranmission upgrades or lines when there are benefits to ratepayers. IEP submits that as a general rule most transmission upgrades or lines will have system benefits and therefore should be paid for by the utility's ratepayers.

IEP asks the Commission to adopt a cost cap to provide some certainty about QF access to transmission. IEP proposes that any transmission project undertaken at an estimated expense below the cost cap would be presumed reasonable. In this way, IEP asserts a QF will have an indication of what transmission lines should be built by the utility to accept QF power.

IEP's witness Jan Hamrin testified that a cap of about $180/kW is appropriate for all utilities' area transmission lines. Hamrin agreed with PG&E's witness Malinowski that all bulk transmission lines have generalized system benefits. Accordingly, a cost cap for bulk transmission lines is unnecessary since the ratepayers always are responsible for these lines.

Ultrasystems submits that a cost cap for transmission projects should not be adopted. Ultrasystems states that the adoption of a cost cap would assume a long-run avoided cost for the utility which has not yet been determined. Ultrasystems argues that until the long-run avoided cost methodology is determined, a transmission cost cap cannot be adopted.

Pacific Lighting Energy Systems (PLES) agrees that QFs should not be responsible for transmission facilities which have system-wide benefits to customers. PLES points out that this general concept is expressed in several ways by the different utilities. Accordingly, PLES recommends that the Commission adopt Edison's language as the standard for all utilities to avoid different applications by the utilities.

In addition, PLES submits that a cost cap, if adopted, should be used only as a general guideline in assessing the reasonableness of a transmission project. PLES emphasizes that a QF should have the right to come to the Commission if a utility refuses to build a transmission upgrade or line because its cost exceeds the cost cap.

V

Refund of Interim Solution 1.7 Mills/Kilowatt-hour (KWh) Assessment

PG&E and staff recommend that since QFs should not be held responsible for the cost of most transmission upgrades, 1.2 mills/kWh should be refunded from any payments received under the terms of the interim solution. In addition, the 1.7 mills/kWh charge should be reduced to .5 mill/kWh prospectively. The interim solution provided that 1.2 mills/kWh of the 1.7 mills/kWh is refundable if the Commission determines that QFs have no cost responsibility. However, PG&E believes the interim solution is unclear as to what QFs should pay after the Commission's decision is issued. PG&E and staff assert that it is equitable for QFs to continue paying .5 mill/kWh over the life of the contracts since the QFs are receiving the benefits of transmission access before the transmission upgrades and lines necessary to accommodate their deliveries are completed.

The QFs maintain that no assessment is appropriate after the Commission issues a decision finding that QFs usually will have no cost responsibility. The QFs assert that the Commission cannot in "good conscience" assess a continuing charge of .5 mill/kWh, no matter how small, after it determines that QFs are not responsible for transmission upgrades or lines.

VI
Discussion

A. QFs generally are not responsible for the cost of transmission upgrades or lines

QF deliveries are a significant part of each utility's resource plan. Accordingly, utilities must plan for and otherwise enable QF facilities to interconnect with their transmission systems in an expeditious manner. We recognize that both the diversity and the number of emerging QFs in PG&E's system have created new problems for the company's transmission planners. However, PG&E along with the other utilities must learn to facilitate the addition of QF power as it already has learned to accept power deliveries from all other resources.

The parties have agreed among themselves that QFs should not be responsible for the cost of transmission facilities which serve multiple purposes. The parties find since the ratepayers in the past have paid for these transmission facilities, the ratepayers should continue to absorb the cost as long as the transmission facility has system-wide benefits. A QF is responsible only for interconnection and other facilities that have no system-wide benefits and are solely beneficial to the QF. This approach eliminates the need for a difficult cost allocation among the various users of a transmission facility.

System-wide benefits can mean many things as shown in SDG&E's list of factors affecting its transmission planning. Thus, we believe that nearly all transmission facilities arguably may have some system-wide benefits. Bulk transmission lines by definition have system-wide benefits. And nearly all area lines probably will have some system-wide benefits. Thus, QFs will assume cost responsibility only on a rare occasion that an area line lacks any perceptible system-wide benefit.

On occasion, a transmission facility's cost may outweigh its system-wide benefits. In this event, the QF perhaps should be responsible for any excessive cost caused by the interconnection of its facility to the utility's system. A rigourous cost-benefit analysis, however, touches upon many as yet undefined criteria.

We have yet to determine a long-run avoided cost methodology for QFs. We have not yet adopted consistent energy reliability criteria for all utilities. The cost of transmission service is just one piece to the puzzle of properly valuing QF power. Thus, for the moment, we will allow utilities to follow the general principle that as long as a transmission facility has system-wide benefits, the utility's ratepayers are responsible for the prudent and reasonable cost. The QF is responsible only for interconnection cost and other special facilities which have no system-wide benefits. Refinement of this principle must await our determination in the long-run avoided cost proceedings.

B. A transmission cost cap can be a useful guideline for utilities and QFs

PG&E has asked for Commission approval of the concept of a cost cap. PG&E's witness Malinowski carefully explained that a cost cap would help PG&E in its transmission planning for QFs as a benchmark of costs that will be absorbed by ratepayers. However, Malinowski went on to say that PG&E would continue the same analysis in its transmission planning that would occur without the guideline of a cap. The concept of a cost cap is attractive but the calculation of the level of a cap involves many of the previously mentioned criteria which are not well-defined. To the extent a cost cap will be added to PG&E's existing analysis and will not become an accepted substitute for the usual study of a proposed transmission facility, it may refine and improve PG&E's current transmission planning process. Thus, we will permit PG&E to develop a cost cap and use it as a tentative guideline in its planning.

We caution PG&E that its calculation of a cap may be examined by QFs and staff. The level of a cap may vary greatly depending on the selected assumptions. The information underlying the derivation of any cap should be shared with all interested parties. A QF may, by complaint to the Commission, allege that a selected cap is unreasonable and thereby bring the reasonableness of the utility's calculation into issue.

C. A .5 mill/kWh assessment should continue until the transmission upgrades associated with the interim solution are completed

Under the terms of the interim solution, 1.2 mills/kWh of the 1.7 mills/kWh assessment is refundable if the Commission finds the QFs have no cost responsibility for transmission upgrades. Since we have determined that QFs have virtually no responsibility for transmission facilities with system-wide benefits, 1.2 mills/kWh clearly should be refunded.

Since QFs participating in the interim solution will receive access to transmission before the associated upgrades are completed, we find it is reasonable to continue a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed. The payment is a minimal offset to the potential diseconomies identified by PG&E. However, since PG&E has stated that the diseconomies will end once the upgrades are completed, there is no reason to continue the assessment beyond the completion date. Therefore, as each upgrade is completed, the QFs whose delivery was constrained by that line no longer should be liable for a .5 mill/kWh charge.

D. PG&E's Petition to Modify the Interim Solution to Exclude the Intertie should be granted

The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling, incorporate it by reference herein, and grant PG&E's Petition to Modify D.84-08-37. We find after reviewing the evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution.

We stated in D.85-06-163, the Orphan Contracts decision, that resolution of PG&E's Petition to Modify would determine the ability of HydroPool to enter Standard Offer 4 agreements with PG&E. Our decision to grant PG&E's Petition means, of course, that HydroPool does not have the ability to enter Standard Offer 4 agreements under the terms of the interim solution, as long as its interconnection is through the Intertie. We note that we need not reach the issue of whether HydroPool's Standard

Offer 4 tenders complied with all requirements prior to our having prospectively suspended Standard Offer 4.

We stress that this decision does not determine *access* to the Intertie. No one has declared that HydroPool cannot use the Intertie to deliver power to PG&E. The dispute is one over the price which must be paid for that power. The evidence in this case supports our decision, made in response to a documented, critical but temporary situation of transmission system constraints, not to make Standard Offer 4 prices available to *any* QF interconnecting with the Intertie. The record nowhere indicates and, in fact, contradicts any notion that either the Commission, the Commission staff, the respondent utilities, or any QF ever contemplated that our Standard Offers applied to such interconnection, particularly in such circumstances. We do not know whether the institutionalized avoided cost of Standard Offer 4 is appropriate for a situation where, because of the Intertie interconnection, a QF's power of necessity will always displace economy power from the Northwest whenever such power is available to fill PG&E's capacity entitlement. We do not believe PURPA requires such a result, without convincing evidence that PG&E's avoided cost in such a situation is indeed equivalent to the Standard Offer 4 price.

Finally, we do not reach the larger question of whether, and, if so, under what conditions, QFs ever should have access to the Intertie under a Standard Offer type of option. Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. Issues to be addressed in that proceeding will include, but will not be limited to:

1. the extent to which unlimited power purchases resulting from interconnection of out-of-state QFs would cause displacement of economy energy, especially from the Northwest;

2. the feasibility of developing pricing and curtailment options to protect ratepayers from paying uneconomic prices

to out-of-state QFs should we determine that out-of-state QFs ought to be given an opportunity to serve the California power market;

3. a comparison of California and non-California avoided costs, to provide a perspective on the relative attractiveness of California as a market for out-of-state QF power; and

4. an evaluation of the circumstances, if any, under which it would be appropriate to make standard offers available to out-of-state QFs and the form that such offers should take.

By examining the problems of how to deal with out-of-state QFs in a generic proceeding, we will avoid the risk of reaching a conclusion on these issues based on the necessarily incomplete record and limited perspective raised in the current proceeding in which the focus was exclusively on HydroPool's projects. The question of whether HydroPool should be granted access to the Intertie will appropriately become part of the more general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection.

Findings of Fact

1. PG&E expects to have significant constraints in its northern transmission system during the next ten years which may affect QF development.

2. Edison and SDG&E do not expect to have any significant transmission constraints over the next ten years.

3. The parties agree that transmission facilities which have system-wide benefits should be paid for by ratepayers.

4. The parties agree that transmission facilities which lack system-wide benefits and are beneficial only to the QF should be paid for by the QF.

5. Bulk transmission lines have system-wide benefits and should be paid for by ratepayers.

6. Nearly all area transmission lines will have system-wide benefits and should be paid for by ratepayers.

7. A rigorous cost-benefit analysis of a transmission facility is dependent on criteria yet to be defined in other Commission proceedings.

8. QFs participating in the interim solution should be refunded 1.2 mills/kWh but should continue to pay a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed.

8a. D.85-06-163 stated that resolution of PG&E's Petition to Modify the interim solution by excluding the Intertie would determine the ability of HydroPool to enter Standard Offer 4 agreements with PG&E.

9. The Intertie is different from other constrained transmission lines in PG&E's northern system since (1) QF interconnection to the Intertie may cause greater displacement of economy power than QF interconnection to other lines, (2) QF interconnection to the Intertie will affect PG&E's negotiations of power purchase deliveries over the Intertie, and (3) PG&E has never represented to QFs that interconnection to the Intertie would be acceptable without price adjustments or curtailment provisions.

10. This investigation should be closed so that the parties may devote their attention and resources to the pending OIR 2 proceedings and the determination of long-run avoided cost for QFs.

Conclusions of Law

1. Ratepayers in the past have paid for transmission facilities which serve multiple purposes. Ratepayers should continue to pay for transmission facilities which have system-wide benefits.

2. QFs participating in the interim solution should continue to pay a .5 mill/kWh assessment until the transmission upgrades which are intended to eliminate operating diseconomies are completed.

3. A rational basis exists for excluding the Intertie from the terms of the interim solution.

3a. PG&E's Petition to Modify D.84-08-037 to exclude the Intertie from the terms of the interim solution should be granted.

3b. Granting PG&E's Petition to Modify will have the effect of determining that HydroPool does not have the ability to tender Standard Offer 4 contracts to PG&E under the terms of the interim solution, but will not have the effect of excluding Hydro-Pool from the Intertie under some other pricing arrangement.

4. The Commission should establish a separate proceeding to investigate the unresolved questions relating to the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place. The issue of whether HydroPool should be granted interconnection for its projects should be taken up in this new proceeding.

ORDER

IT IS ORDERED that:

1. Utilities shall require QFs to pay only for transmission facilities which lack system-wide benefits and are beneficial only to QFs.

2. QFs participating in the interim solution shall be refunded 1.2 mills/kWh and shall continue to pay .5 mill/kWh until the transmission upgrades associated with the interim solution are completed.

3. Pacific Gas and Electric Company's Petition to Modify D.84-08-037 is granted to exclude the Intertie from the terms of the interim solution.

4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place.

5. I.84-04-077 is closed.

This order becomes effective 30 days from today.

Dated *September 18, 1985*, at San Francisco, California.

DONALD VIAL
President
VICTOR CALVO
FREDERICK R. DUDA
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate.

I will file a written dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

Appendix A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	I.84-04-077 (Filed April 18, 1984)

Administrative Law Judge's Ruling

Introduction

On April 12, 1985, counsel for Pacific Gas and Electric Company (PG&E) moved to dismiss the proceeding insofar as it involved the right of HydroPool-Cogeneration Services, Inc. (HydroPool) to interconnect to the Pacific Northwest-Pacific Southwest 500 Kv Intertie (Intertie). San Diego Gas and Electric Company (SDG&E) and the Commission's Public Staff Division (staff) moved to strike the evidence offered by HydroPool.

The Commission in Decision (D.) 84-11-123 granted a limited rehearing on the question of Qualifying Facility (QF) interconnection to the Intertie under the terms of an interim solution for transmission constraints in PG&E's service territory. Hearings were held on December 17, 1984, March 28-29, 1985, April 9, 10, and 12, 1985. John E. Kerler, Supervising Power System Engineer, testified on behalf of PG&E. Dennis E. Peseau, Senior Vice President and Senior Economist of Zinder Companies, Inc., Robert K. Weatherwax, Jr., President of Sierra Energy and Risk Assessment, Inc., and Ivan Gold, President of Cogeneration Services, Inc. and managing partner of HydroPool, all testified on behalf of HydroPool. Further hearings were suspended until a ruling is issued on the motions.

PG&E, other utilities, and staff have argued that the intent of the signatories to the interim solution is the only relevant factor. They intended to exclude the Intertie from the interim solution.

Accordingly, they assert HydroPool or any other QF has no right to interconnect to the Intertie under the terms of the interim solution.

PG&E's witness Kerler explained why PG&E has excluded the Intertie from the interim solution. Kerler testified that at the time the interim solution was drafted, PG&E believed no firm capacity on the Intertie would be available for QFs. If QFs were allowed to interconnect to the Intertie, PG&E believed that the QFs would displace cheaper economy power from the Northwest.

PG&E asserts that the QFs which are allowed to interconnect to constrained bulk or area lines under the interim stipulation will cause only temporary operating diseconomies since transmission upgrades have been identified for those lines. Thus, PG&E agreed to allow QF interconnection to those lines because the company believes the lines' capacity can be increased and the disconomies will end.

PG&E's evaluation of the Intertie is quite different. PG&E has never believed that firm capacity on the Intertie will be available. Consequently, the company consistently has refused to give QFs any access to the Intertie.

HydroPool responded to PG&E's showing by attempting to show that access capacity will be available on the Intertie and that other QFs could cause displacement of Northwest economy power.

HydroPool's witness Peseau testified that firm surplus resources in the Northwest and very favorable water conditions have resulted in high utilization of the Intertie in the last four years. Peseau asserted that the Northwest's large surplus should diminish and average water conditions should return in the future. He concluded that the declining firm surplus with average water conditions should not fill the expanding capacity of the Intertie.

HydroPool's witness Weatherwax examined PG&E's long range plans and determined that PG&E should not use all of its Intertie capacity over the course of any year for the next 20 years. Weatherwax stated that if HydroPool is permitted to interconnect its projects to the Intertie there will not be a one-to-one displace-

ment of Northwest economy power. In addition, Weatherwax testified that other QF projects may cause displacement of Northwest economy power during minimum load conditions. Thus, Weatherwax asserts HydroPool is similar to other QF projects in its impact on the PG&E transmission system.

HydroPool's witness Gold testified that the only economic market for the HydroPool projects is in California and the Intertie is the only transmission path for these projects. Without Commission approval, Gold stated that HydroPool's projects will not be built.

PG&E Motion to Dismiss

PG&E raises several grounds for dismissing HydroPool's claim in this proceeding. PG&E argues that HydroPool is not entitled to a QF contract, that HydroPool's marketing agreements are not legal under PURPA, and that HydroPool has failed to comply with Decision (D.) 84-08-037. In addition, PG&E maintains that no unlawful discrimination has been shown by HydroPool.

PG&E asserts that since HydroPool is not the owner or operator of its cogeneration and small power production facilities, HydroPool is not a QF under PURPA. PG&E points out that HydroPool is a broker or agent for QFs as it owns only a de minimis 2.5% holding in one facility.

Furthermore, PG&E claims HydroPool even lacked authority to execute power purchase agreements on behalf of the developers. PG&E asserts that HydroPool's marketing agreements with developers provide that HydroPool is merely to deliver power purchase agreements to the developer for the developer's execution.

PG&E submits that HydroPool is a broker for power and is not a QF. Accordingly, PG&E believes HydroPool's claim should be dismissed.

PG&E next argues that HydroPool's marketing agreements provide for deliveries of utility power at QF prices. The marketing agreements contain "shaping" provisions which permit substitution of a "shaping" utility's power for the QF's generation. PG&E submits that this "shaping" substitution clearly violates PURPA.

PG&E argues that HydroPool has not complied with the interim solution as approved by the Commission in D.84-08-037. The interim solution provided that priority rights for each transmission allocation are not transferable between projects. PG&E points out that only seven of the fourteen projects mentioned by HydroPool to PG&E in August, 1984, are still being pursued. PG&E asserts HydroPool has substituted other projects for some of the original projects in violation of D.84-08-037.

Finally, PG&E submits that no discrimination has been shown by HydroPool since no QF has been allowed by PG&E to deliver over the Intertie. PG&E points out that HydroPool was offered an opportunity to deliver power on a radial line to a PG&E area transmission line. Furthermore, PG&E claims that it has denied the request of another QF to interconnect to the Intertie. Thus, PG&E concludes that HydroPool has been treated in the same manner as other QFs.

HydroPool Response

HydroPool asks the Commission to deny PG&E's motion for several reasons.

First, HydroPool asserts that PG&E failed to make its motion upon five days written notice as required by Rule 56. HydroPool claims PG&E has known of HydroPool's agency relationship with its projects as early as November, 1984. Therefore, HydroPool argues PG&E's motion is improper and should be denied.

HydroPool also asserts that it was expressly authorized to act as agent for QF project owners. HydroPool claims that the owners verbally authorized its agency authority and subsequently ratified HydroPool's actions.

HydroPool points out that it has never received a transmission allocation under the interim solution since PG&E consistently has denied all requests for interconnection to the Intertie. Therefore, HydroPool submits it has not improperly shifted an allocation between projects.

Finally, HydroPool maintains that all QFs participating in the interim solution may cause displacement of Northwest economy

power. Thus, HydroPool asserts that the seasonal displacement of Northwest economy power is not a valid basis for excluding only HydroPool's projects from the interim solution.

SDG&E and Staff Motion to Strike

SDG&E moved to exclude the testimony of HydroPool witnesses Peseau and Weatherwax. Counsel for SDG&E argues that the interim solution rationally differentiates between classes of QFs. He asserts the Intertie is significantly different from the rest of PG&E's transmission system and is properly excluded from the interim solution. To SDG&E, interconnection to the Intertie is a price issue which should be addressed in another proceeding.

Staff joined SDG&E in moving to strike the testimony of Peseau and Weatherwax. Staff believes the only relevant issue is the intent of the interim solution. Staff further argues that HydroPool's witnesses have not shown that one-to-one displacement of economy power will not occur if its projects interconnect to the Intertie.

Discussion

The purpose of the interim solution was to enable QFs in PG&E's constrained northern transmission system to proceed with their projects until these constraints are relieved by transmission upgrades and new transmission lines. The terms of the interim solution were limited to QFs located within PG&E's service territory. The Commission in D.84-08-037 removed the in-service area restriction and stated: "At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries."

PG&E immediately filed a petition for modification of D.84-08-037 asserting that it intended to exclude the Intertie from the interim solution because interconnection to the Intertie could result in one-to-one displacement of economy power. PG&E also asserted that this displacement would not be relieved by planned transmission upgrades or new transmission lines. PG&E then

asked the Commission to exclude the Intertie from the interim solution as a matter of policy.

The Commission declined to exclude the Intertie from the interim solution and instead ordered a limited rehearing on this matter. (See D.84-11-123.)

The issue addressed in the limited rehearing is whether PG&E's proposed exclusion of the Intertie from the interim solution is a reasonable distinction among its constrained transmission lines or unlawful discrimination against a class of QFs.

The California Supreme Court in *United States Steel Corp. v. Public Utilities Commission*, 29 Cal. 3d 603 (1981) set forth some guidelines for the Commission's determinations on claims of discrimination. The Court affirmed the Commission's wide discretion in prescribing economic classifications but stated that mere administrative inconvenience may not justify an imprecise classification. The Court observed that the Commission's finding of administrative "difficulty" to support a rate exemption was inadequately supported by record evidence. (29 Cal. 3d at 614.) Here it is unlikely that the mere declaration of the signatories' intent would be considered a sufficient basis for the exclusion of one transmission line and QFs in proximity to that line from the interim solution.

The record for this proceeding now contains sufficient evidence for a Commission finding. Prior to hearing, the Commission lacked any evidence apart from a PG&E petition alleging that permanent one-to-one displacement of economy power could result from QF interconnection to the Intertie. At hearing, PG&E was required to present a witness to substantiate its claim. HydroPool was permitted to cross-examine and was given an opportunity to present rebuttal witnesses. In addition, PG&E stated it wants to present additional evidence should the Commission find that its initial presentation is lacking.

The salient facts developed in the record are as follows:

In recent years, PG&E's capacity entitlement on the Intertie was fully utilized due to above average hydro conditions. Based on this recent experience, the company may predict that all of its

capacity on the Intertie could be used in the next few years. Assumption of average hydro conditions would lead to a different conclusion, i.e., capacity will be available most of the year. However, at times such as during the spring run-off months, the Intertie will be fully used even under average hydro conditions. If allowed to interconnect, HydroPool's projects will displace economy power at these times.

The QFs allowed to interconnect to other constrained transmission lines also may cause displacement of economy power on the Intertie. Under minimum load conditions, surplus area generation may be transmitted from the northern area to the Bay Area over the Intertie. To the extent QF deliveries in the northern area cause a resource-load imbalance, these QFs may displace economy power deliveries over the Intertie if other PG&E resources are not curtailed.

PG&E has claimed that the operating diseconomies expected under the interim solution are temporary. However, the transmission upgrades associated with the interim solution will not relieve a capacity constraint on the Intertie. Thus, the diseconomy of Intertie back-offs may continue after these upgrades are completed.

PG&E never has allocated firm capacity on the Intertie to a QF. PG&E instead has offered to purchase QF power delivered on the Intertie on an interruptible basis or at prices competitive with economy power.

From these facts, one may find a few differences between QF interconnection to the Intertie and to other constrained transmission lines. First, direct interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PG&E's capacity entitlement. Interconnection to other transmission lines will cause displacement only when such economy power is available *and* uncurtailed area generation exceeds area load. Consequently, the amount of displacement from QF interconnection to the Intertie may exceed any Intertie back-off caused by other QF interconnection to other lines. Second, direct interconnection will reduce PG&E's available firm capacity on the Intertie in its negotiations of long term capacity contracts in

the Northwest. Other QF interconnections to other lines will not alter PG&E's negotiating posture. Third, PG&E never has represented to QFs that it would accept firm QF deliveries on the Intertie without price concessions. On the other hand, until PG&E's discovery of unforeseen constraints in its northern transmission system, PG&E expected QF interconnection to other transmission lines to occur under the various approved standard offers in the ordinary course of business. Thus, there is a basis for distinguishing the Intertie from other constrained transmission lines.

Ruling

The objective of this proceeding and the interim solution has been to allow QF development to proceed despite the unforeseen transmission constraints in PG&E's northern transmission system. This objective has been reasonably met by the interim solution without unlawful discrimination against a class of QFs. No further hearings are required on the issue of QF interconnection to the Intertie under the terms of the interim solution. The Commission may modify D.84-08-037 to exclude the Intertie from the interim solution as requested in PG&E's petition for modification. Alternatively, the Commission may deny PG&E's petition and allow HydroPool to participate in the interim solution as a matter of policy.

The various motions to strike or exclude HydroPool's evidence are denied as the Commission should issue a decision based on findings drawn from this evidentiary record. PG&E's objections to HydroPool's standing as a QF will be addressed if the Commission should find that QFs should be allowed to interconnect to the Intertie under the terms of the interim solution.

Dated July 30, 1985, at San Francisco, California.

/s/ RANDOLPH L. WU
Randolph L. Wu
Administrative Law Judge

Appendix B

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the desirability of power purchases from cogenerators and small power producers located outside of the purchaser's service area or outside of California and the terms and conditions which should be applied to such purchases.	No. I. 85 11 008

ORDER INSTITUTING INVESTIGATION

[Filed Nov. 6, 1985]

By this order, the Commission begins an investigation of electric capacity and energy purchases by Pacific Gas and Electric (PG&E), Southern California Edison (SCE), and San Diego Gas and Electric (SDG&E), from cogenerators and small power producers, otherwise known as qualifying facilities (QFs), located either outside the utilities' service areas or outside of California.

QFs located in the Pacific Northwest, the Southwest, and California's Imperial Valley want to wheel power to California utilities and take advantage of higher avoided cost rates than are offered by utilities in their regions. However, the actual avoided costs paid to out-of-service area and out-of-state QFs may differ from the avoided costs paid to other California QFs. If QFs wheel power over interties, their power might displace economy energy purchases which would cause economic harm for California's ratepayers. Maintaining ratepayer indifferences, as a result of accurate avoided cost, may require additional curtailment provisions or a different pricing structure than is available to in-service area QFs.

As part of I.84-04-077, the Commission adopted D.84-08-037 which authorized an interim solution to allow QFs to continue development in the northern part of PG&E's service area during

completion of transmission capacity upgrades and additional new lines.

Cogeneration Services, Inc. (Hydro Pool) sought to wheel power from projects in the Pacific Northwest to PG&E over the Pacific Intertie under the terms of the interim solution. In D.85-09-058, the Commission decided that the Pacific Intertie should be excluded from the interim solution but that the issue of purchases from out-of-state QFs deserved further study. Ordering paragraph No. 4 states:

> "4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place."

Since many of the issues that apply to out-of-state QFs, such as the use of interties, also apply to QFs in the Imperial Valley and other remote areas of California, the scope of this investigation is expanded to include QFs located in the state but outside the purchasing utilities' service area. For these reasons, we are making the major electric corporations respondents to this general investigation.

Therefore, good cause appearing,

IT IS ORDERED that an investigation on the Commission's own motion is hereby instituted into the desirability of purchasing power from QFs located outside the service area of the purchasing utility or outside the state for the purpose of determining:

1. the extent to which unlimited power purchases resulting from interconnection of out-of-service area QFs would cause displacement of economy energy from the Northwest and Southwest;

2. the feasibility of developing pricing and curtailment options to assure that the true costs avoided by QFs are measured, including the foregone opportunity of the use of transmission lines for other sources;

3. additional contract terms needed to allow purchasing utilities to track the progress of out-of-service area QFs for resource planning purposes;

4. an evaluation of the circumstances, if any, under which it would be appropriate to make standard offers available to out-of-service area QFs and the form of such offers; and

5. the potential discriminatory and anti-competitive effects of accepting or not accepting out-of-state QFs with the possibility for economic harm or no economic harm to the California ratepayers; and

6. additional contract terms and conditions and other factors which would negate or ameliorate against any potential economic harm to the California ratepayer.

IT IS FURTHER ORDERED that each electrical corporation named and interested parties shall file with the Commission's Docket Office by November 25, 1985 an original and 12 copies of a statement addressing each of the above issues and listing additional issues that should be included in the investigation. A prehearing conference will be scheduled to set forth the issues and schedule for this proceeding.

The Executive Director is directed to mail a certified copy of this order to the respondents and to cause a copy of this order to be mailed to all appearances in A.82-04-044 *et seq.* and I.84-04-077.

Dated November 6, 1985, at San Francisco, California.

DONALD VIAL
President
VICTOR CALVO
PRISCILLA C. GREW
WILLIAM T. BAGLEY
FREDERICK R. DUDA
Commissioners

Appendix C

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Second Application of Pacific Gas and Electric Company for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2	Application No. 82-04-44
	Application No. 82-04-46
And Related Applications	Application No. 82-04-47

[Filed May 22, 1985]

PETITION FOR MODIFICATION
BY COGENERATION SERVICES, INC.
OF DECISION 85-04-075

I

INTRODUCTION

COGENERATION SERVICES, INC., ("COGEN") is a developer of alternative energy sources. It develops and markets small hydropower and cogeneration projects in California, and other states. COGEN is also a general partner of Hydropool, a partnership which develops similar projects, both in the Northwest and in California. (Both parties hereafter "COGEN"). COGEN appeared as Interested Parties in this case at the November 5 *en banc* hearing and argued against the Staff motion for various modifications to Interim Standard Offer 4. RT.1428:7-8. COGEN subsequently filed an opposition memorandum both to the Staff motion and a related motion made orally by PG&E at the *en banc* hearing; and concurrently requested a continuance of the hearings on those motions. COGEN has also participated in workshops held by the Public Staff to discuss the issues in this case.

In addition COGEN has participated as an Interested Party in the "transmission constraints" case, OII 84-04-77. A major issue

in that case has been the applicability of the Commission's "Interim Solution Order" to QFs located outside PG&E's service area. See D.84-08-037. Shortly after its issuance, PG&E petitioned to modify the "Interim Solution" so as to exclude fourteen of COGEN's Northwest QF projects which planned to interconnect on the Pacific Northwest Intertie. In response to that Petition, the Commission first ordered limited rehearings in D.84-11-123; and later ordered consolidation of the Intertie issue with the bulk transmission hearings. See D.85-01-039. Since then, the parties have presented several witnesses and documentary evidence in the course of several hearings. A motion to dismiss is now pending before the Commission.

After the Interim Solution was adopted, COGEN requested interconnection with PG&E and the preparation of standard contracts for the fourteen projects. See Exhibits 1 and 2 attached. Because of the pending Petition for Modification, PG&E refused to process the contracts in the ordinary course. See Exhibit 3 attached. Rather, hearings were set on the Petition. During this time COGEN tendered contracts for each project and proposed execution conditioned upon the outcome of the hearings. See Exhibit 4 attached. PG&E, however, would not accept this proposal.

The Commission's suspension order, D.85-04-075, on its face, would preclude execution of contracts with the fourteen Northwest QFs, even if the Petition for Modification in the constraints case is denied. However, COGEN believes that the fourteen Northwest contracts were not intended to be affected by the Commission's suspension order herein. Rather, because of the unique circumstances, the Northwest QF projects have been suspended pending the outcome of hearings on the Intertie issue and PG&E's Petition for Modification. This "limbo" status existed for eight months prior to the April 17 suspension order. Therefore, the availability of Interim Standard Offer 4 for these projects should rest upon a decision in the Constraints case.

At the Workshop of May 3, 1985 Commission Staff indicated that QFs who were affected by the suspension order should request relief by means of a Petition for Modification. Therefore, the purpose of this Petition is to seek clarification from the

Commission that the Decision 85-04-075 would not apply to the fourteen QFs; and that interim Standard Offer 4 may be available to them upon a decision in the Case No. I-84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

II

FACTUAL BACKGROUND

In August, 1984, the Commission issued Decision No. 84-08-037 which approved the Interim Solution for QFs in PG&E's northern area. In that order, the Commission modified a prior stipulation by certain parties to provide that the benefits of the order would extend to all QFs affected by transmission constraints, whether within or without PG&E's Northern service area. *Id.* at page 10, OP No. 1a; FF No.'s 7 and 8. This modification was made upon the motion of several QFs at a prior prehearing conference, including COGEN. *Id.* at page 5. PG&E subsequently petitioned to modify the order so as to exclude QFs interconnecting to the Intertie north of Round Mountain Substation. The only QFs affected by such petition are the fourteen Northwest projects proposed by HydroPool.

Before decision on this Petition, HydroPool requested interconnection and the preparation of contracts for its fourteen Northwest projects. See Exhibits 1 and 2 attached. PG&E refused to process this request, contending that it did not believe the Interim Solution applied to QFs on the Intertie. See Exhibit 3 attached. Thereafter, out of concern with the regulatory lag, HydroPool tendered seven contracts in PG&E's Standard Offer 4 form conditioned upon the outcome of the Petition for Modification. See Exhibit 4, para. 4. PG&E refused to sign any contracts for similar reasons. As described above, the Commission subsequently ordered limited rehearings on the Intertie issue; and later consolidated them with the first phase hearings on bulk constraints. See D.84-11-123 and D.85-01-039. The remaining seven contracts were subsequently submitted and refused.

III

GROUNDS FOR RELIEF

As stated in PG&E's Petition for Modification of D.85-04-075, most of the "orphan contracts" remained unsigned on April 17 because of the "gold rush" of contracts submitted in the last few weeks prior thereto. See PG&E's Petition for Modification 2:14-23 (5/15/85). In effect, PG&E contends that it could not execute all these contracts in due course because of the heavy volume of contracts tendered. *Id.*

Unlike these QFs, PG&E never *began* to process the contracts tendered by HydroPool. In fact, it was necessary for HydroPool to fill out a contract form and tender it to PG&E because of the Utility's unwillingness to prepare formal contract documents, as is customary. Its express reason for doing so was the pendency of rehearings on the Petition for Modification; and its belief that it was not obligated to purchase from QFs delivering on the Intertie. See Exhibit 3. PG&E recognized the unique circumstances: "Because PG&E views HydroPool's position, vis-a-vis the interim solution, as unique this reservation of participation is not contingent upon any further action by HydroPool at this time." Exhibit 3, para. 2.

Thus, the reasons for non-execution of these fourteen contracts are very different from those other QFs which could not obtain mutually signed contracts because of the "gold rush." For this reason, and because the lack of execution is due to hearings pending before the Commission, HydroPool does not believe that the Commission intended to include the Northwest projects in its order suspending Standard Offer 4.

Furthermore, to so hold would be grossly inequitable under these circumstances. HydroPool first requested interconnection and Standard Offer 4 contracts on August 7, 1984. The Commission did not suspend Standard Offer 4 until April 17, some eight months later. The sole reason for PG&E's failure to execute these contracts was its pending Petition for Modification, and the ensuing hearings on the Intertie issue. But for the pendency of these hearings it is clear that the Northwest projects would have moved forward and contracts been signed in due course. Utilities

have a mandatory duty to sign Standard Offers in Commission-approved form, unless the QF requests negotiated terms. D.84-08-031, p.61, OP#3. Thus, it is only the regulatory lag time which has placed these fourteen QFs under the suspension order.

If the Commission denies the Petition for Modification (as it should) and allows the Northwest projects to proceed under the Interim Solution it would be grossly inequitable to deny to them the form of contract which was available and would have been executed but for the Petition for Modification. Otherwise, such a result would penalize a QF after it had relied on a Commission order and because a utility chose to fight the issue.

IV

CONCLUSION

For the reasons stated herein, COGEN respectfully requests that the Commission modify D.85-04-075 to provide that the suspension of Standard Offer 4 does not apply to the fouteen HydroPool projects totaling 66.2 megawatts; and that interim Standard Offer 4 may be available to them upon a decision in Case No. I.84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

Dated: May 22, 1985.

Respectfully submitted,

PETTIT & MARTIN

By: EDWARD B. LOZOWICKI
EDWARD B. LOZOWICKI
Attorneys for Cogeneration Services, Inc. and HydroPool, Interested Parties

Appendix D

Cal. Pub. Util. Code § 1709 provides:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Cal Pub. Util. Code § 1733(b) provides:

> "Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 60 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application."

Rule 63 of the Commission's Rules of Practice and Procedure, found at 20 Cal. Admin. Code § 63, provides:

> "Authority. The presiding officer [Administrative Law Judge] may set hearings and control the course thereof; administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission."

Supreme Court, U.S.
FILED
NOV 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-686

In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC.,
Appellants,

VS.

CALIFORNIA PUBLIC UTILITIES COMMISSION
and
PACIFIC GAS and ELECTRIC COMPANY,
Appellees.

On Appeal From The Supreme Court of California

MOTION TO DISMISS

MICHAEL S. HINDUS
(Counsel of Record)
HOWARD V. GOLUB
MARK R. HUFFMAN
Attorneys for
Pacific Gas and Electric
Company
77 Beale Street
San Francisco, CA 94106
Telephone: (415) 972-2859
Counsel For Appellees

November 28, 1986

BROWN OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

Page

Statement Of The Case 1

Summary Of Argument 6

I

The Commission Acted Pursuant To Its Exclusive Authority Under PURPA 7

A. PURPA Delegates To State Commissions The Determination Of Prices To Be Paid To QFs 7

B. The Order Complies With The FERC's Requirements 12

II

Decision No. 85-09-058 Does Not Illegally Burden Interstate Commerce 13

A. No Distinction Was Made On The Basis Of Location In Or Out Of State 14

B. Even If Distinction Based On Location In Or Out Of California Can Be Established, There Are Countervailing Local Benefits 15

C. There Can Be No Commerce Clause Violation Where, As Here, There Is A Reason To Treat Hydropool's Power Differently Apart From Its Origin 17

1. Even Under Stricter Scrutiny, The Decision Of The Trier Of Fact Will Not Be Disturbed 19

2. The Commission Established A Clear Factual Basis For Treating Out-Of-Area Projects Differently 19

TABLE OF CONTENTS

Page

III

The CPUC Did Not Impermissibly Impair Any Contracts 22

A. No Contracts Between PGandE And Hydropool Existed 23

1. Hydropool Did Not Obtain Standard Offers Because Its Projects Were Not Eligible For Standard Offers 23

2. Hydropool Has No Contract Because Standard Offer Forms Cannot Be Used For Out-Of-Area QFs And Hydropool Wanted To Vary The Terms Of The Standard Offer 26

a. Standard Offer Forms Are Inappropriate For Out-Of-Area Projects Such As Hydropool's 26

b. The Standard Offers Were Not Applicable Because Hydropool Had Requested Non-standard Offers 27

B. Even If Hydropool's Submittal Of Standard Offers Created Binding Contracts, The Commission's Actions Have Not Unconstitutionally Impaired Those Contracts 27

1. California's Actions Protect Significant And Legitimate State Interests 28

2. The Two Modern Cases In Which A Contract Clause Challenge Was Successful Are Distinguishable From The Present Controversy 28

IV

This Appeal Must Be Dismissed For Want Of Ripeness Because There Is An Existing Administrative Proceeding In Which Appellants Will Have The Opportunity To Obtain A Remedy 29

V

Conclusion 30

TABLE OF AUTHORITIES

Cases

Page

Allied Structural Steel Co. v. Spannaus 438 U.S. 234 (1978) 23, 27, 28
American Paper Institute, Inc. v. American Electric Power Service Corp. 461 U.S. 402 (1983) 11, 12
Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983) 16
Atlantic Coast Line v. Phillips 332 U.S. 168 (1947) 23
California Trucking Association v. Public Utilities Com. 19 Cal.2d 240, 137 Cal.Rptr. 190, 561 P.3d 280 (1977) ... 4
Dump Truck Owners Association v. Public Utilities Commission, 434 U.S. 9 (1977) 29
Energy Reserves Group, Inc. v. Kansas Power and Light, 459 U.S. 400 (1983) 23, 28
Exxon Corp. v. Governor of Maryland 437 U.S. 117 (1978) 18
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 16
Federal Energy Regulatory Commission v. Mississippi 456 U.S. 742 (1982) 11, 16
Hughes v. Oklahoma, 441 U.S. 322 (1979) 19
Irving Trust Co. v. Day, 314 U.S. 556 (1942) 23
Maine v. Taylor, ____ U.S. ____, 91 L.Ed.2d 110, 106 S.Ct. 2440 (1986) 13, 19, 22
Minnesota v. Clover Leaf Creamery Co. 449 U.S. 456 (1981) 17
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 17
Philadelphia v. New Jersey 437 U.S. 617 (1978) 18
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 16
Toward Utility Rate Normalization v. Public Utilities Com. 22 Cal.3d 529, 149 Cal.Rptr. 692, 585 P.2d 491 (1978) 19
United States Trust v. New Jersey, 431 U.S. 1 (1977) 23, 27, 28

California Public Utilities Commission Decisions

Decision No. 86-02-033, OII No. 84-04-077, dated February 5, 1986 ..... 4, 6

TABLE OF AUTHORITIES
CALIFORNIA PUBLIC UTILITIES COMMISSION DECISIONS

Page

Decision No. 85-09-058, OII No. 84-04-077, dated September 8, 1985 ..... 4, 6, 8, 13, 14, 15
Decision No. 85-06-163, Pacific Gas and Electric Company dated June 21, 1985 ..... 5, 25
Decision No. 85-01-039, OII No. 84-04-077 dated January 16, 1985 4
Decision No. 84-08-037, OII No. 84-04-077 dated August 1, 1984 ..... 3, 11
Decision No. 83-09-054, Pacific Gas and Electric Company dated September 7, 1983 ..... 9, 10

Federal Energy Regulatory Commission Proceedings

Middle South Services, Inc.,
24 FERC ¶ 63,119 (1982) 12
33 FERC ¶ 61,408 (1985) 12
Roche Products, Inc., 29 FERC ¶ 61,098 (1984) 13
Snow Mountain Pine Company v. C. P. National Corporation and Idaho Power, 30 FERC ¶ 61,293 (1985) 13
Vermont Electric Cooperative, Inc. v. Vermont Public Service Board, 25 FERC ¶ 61,273 (1983) 13

Statutes and Regulations

California Administrative Code Title 20
Section No. 63 20
California Public Utilities Code
Section No. 451 16
Section No. 1709 ..... 5, 25
Section No. 1757 ..... 5, 19
Federal Register
44 F.R. 38870 (1979) 10
45 F.R. 12230 (1980) 10
United States Code
16 U.S.C. § 824a-3 ..... 1, 6, 8
Code of Federal Regulations
18 C.F.R. § 292.401(a) 6, 8, 9
18 C.F.R. § 292.304(c)(3)(ii) 10

No. 86-686

In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC.,
Appellants,

VS.

CALIFORNIA PUBLIC UTILITIES COMMISSION
and
PACIFIC GAS and ELECTRIC COMPANY,
Appellees.

On Appeal From The Supreme Court of California

MOTION TO DISMISS

Appellee, Pacific Gas and Electric Company ("PGandE" or "Company") moves to dismiss the appeal filed by Appellants Hydropool and Cogeneration Services, Inc., ("Hydropool") on the ground that it does not present a substantial federal question. Sup. Ct. R. 16.1(b). This motion also presents several additional reasons why this case should not be set for oral argument. Sup. Ct. R. 16.1(d).

STATEMENT OF THE CASE

This case arises from actions of the California Public Utilities Commission ("CPUC" or "Commission") in implementing rules and regulations pursuant to the Public Utilities Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3, concerning small power producers. In April, 1984, the Commission issued Order Instituting Investigation ("OII") No. 84-04-077 for the purpose of determining whether transmission constraints existed which would impair the development of Qualifying Facility ("QF")

power[1]. PGandE responded that it had transmission constraints in the northern portion of its service territory. Upgrades to eliminate these constraints would take five to seven years to build. In order to expedite the connection of QFs in less time, PGandE, the CPUC Staff, and QF representatives negotiated and the CPUC adopted the "Interim Solution." App. A.

The Interim Solution responded to an immediate crisis of QFs not being able to connect to the northern part of the PGandE system for up to seven years while specific transmission upgrades were built to accommodate that power. It requires PGandE, whenever necessary, to depart from its general obligation (absent certain factors) to dispatch electricity in the most economically efficient manner and authorizes PGandE to take whatever steps are necessary, including diseconomic dispatch, in order to take up to 1150 MW of QF power.

The Commission's unusual authorization to depart from economic dispatch was motivated in part by two mitigating features of the Interim Solution. The first is that the Solution was truly "Interim," in that PGandE was authorized and obligated to depart from economic dispatch only on a *temporary* basis. Second, PGandE agreed to build a specific set of transmission upgrades, which were set forth in the Interim Solution itself, and which would eliminate the need for uneconomic dispatch within five to seven years.

The Interim Solution as drafted was limited to QF projects within PGandE's service territory in Northern and Central California. Additionally, QFs *within* PGandE's service territory were excluded if they would connect to the Pit No. 1 transmission system or to the Humboldt transmission system (beyond 90 MW). App. A 5. The cost to the ratepayers of accommodating these QFs was sufficiently excessive to justify their exclusion. Thus the Interim Solution contained exclusions based on location in PGandE's service territory as well as outside of PGandE's service territory and made no distinction whatsoever based on location in or out of California.

---

[1] Qualifying Facilities are small power producers who "qualify" under PURPA for certain pricing and purchase provisions.

Appellant moved that the Interim Solution be modified to include projects outside of PGandE's service area. Decision No. 84-08-037, approving the Interim Solution, did not settle the matter. That decision removed the restriction that QFs had to be located within PGandE's service area, noting that "at this time, we do not have sufficient cause" to retain the distinction. J.S. App. H 8. But in every other respect the decision accepted the position stated by the CPUC Public Staff and PGandE. As Decision No. 84-08-037 stated:

> However, we also find merit in the concern expressed by the Commission staff and PG&E that unlimited amounts of QF deliveries from outside PG&E's service territory could displace large amounts of more economic power. PG&E's ratepayers could suffer large losses if such displacement is permitted. J.S. App H 8.

The location of Hydropool's projects outside of California is not critical. What is significant is that Hydropool wanted to deliver power over the Pacific Southwest-Northwest Intertie, an extra high voltage transmission line authorized by Congress for the purpose of importing relatively inexpensive energy from the Pacific Northwest to California. The Intertie is different from other transmission lines, among other reasons, in that its primary purpose is to coordinate transactions between utilities, while other transmission lines get power from the source of generation to the load center.

All the major investor-owned utilities in California import cheap power over the Intertie, as do some publicly-owned utilities. Therefore, nearly all electric customers in California benefit from the lower cost power delivered over the Intertie. Hydropool wanted to deliver power over the Intertie at QF prices significantly higher than the low cost power for which the Intertie was built.

After the CPUC removed the service territory restriction, PGandE and a QF trade association, the Independent Energy Producers Association, petitioned for rehearing because of concern about direct displacement on the Intertie of low cost power by Hydropool and because permitting Hydropool's connection

was inconsistent with a second cornerstone of the Interim Solution. The Interim Solution was designed to be truly *temporary* because the specified upgrades would eliminate the need for uneconomic dispatch within five to seven years. However, there were no upgrades in the Interim Solution which would create more capacity on the Intertie. Therefore, if Hydropool was permitted to deliver power over the Intertie at its desired prices, the diseconomic dispatch would continue for twenty years and the cost to ratepayers, *already increased* by the Interim Solution, would increase even more.

In response, the Commission granted limited rehearing to determine whether the Interim Solution should apply to projects located out of the service territory connecting directly to the Intertie. PGandE presented evidence demonstrating that there would be no unused capacity on the Intertie for the next five years and that Hydropool's deliveries would therefore displace economy energy on a one-for-one basis. App. B 1-2.

On January 16, 1985, the Commission issued Decision No. 85-01-039 ordering additional hearings.[2] After those hearings, Administrative Law Judge Wu ("ALJ Wu") issued an order on July 30 describing the distinction between Hydropool's projects and other projects under the Interim Solution, differentiating between the Intertie and other transmission lines, and concluding that there was a basis for treating Hydropool differently. As ALJ Wu found, "direct interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PGandE's capacity entitlement."[3] App. H 25.

While this underlying dispute was being adjudicated, an unrelated issue arose concerning the Commission's prospective sus-

---

[2] That decision noted that the issue could not be resolved in an expedited hearing. PGandE was precluded from making a showing and should this case be remanded would insist on its right to be heard. *California Trucking Association v. Public Utilities Commission*, 19 Cal.2d 240, 244 (1977).

[3] For convenience, a conformed copy of Decision No. 85-09-058 as modified by Decision No. 86-02-033 and incorporating the ALJ ruling is included as Appendix H.

pension of some of the terms under which QFs sell power to the utilities. Hydropool sought to sell power to PGandE under "Standard Offer No. 4," one of four standard Power Purchase Agreements devised by the Commission to facilitate power sales by QFs to utilities. Under Commission orders, the four Standard Offers were required to be offered by utilities to eligible QFs. Thus, the Standard Offers were creatures of regulation and not voluntary contracts freely negotiated between the parties.

In April, 1985, the CPUC suspended interim Standard Offer No. 4, stating that the costs to ratepayers were too high. J.S. App. J. In anticipation of the suspension, Hydropool submitted seven copies of Interim Standard Offer No. 4, allegedly as agent for certain QFs.[4] PGandE rejected these tendered Standard Offers for several reasons, including the fact that they were not appropriate for out-of-area projects, were not properly completed, and because Hydropool had no standing to tender Standard Offers unless and until the Commission ruled Hydropool eligible under the Interim Solution.[5]

Hydropool petitioned the Commission to be exempted from the suspension of Interim Standard Offer No. 4. App. C. In June 1985, the Commission issued Decision No. 85-06-163, stating that the decision on PGandE's Petition for Rehearing would determine whether Hydropool could deliver power under the Standard Offers tendered to PGandE. J.S. App. K 37, 44. Hydropool did not appeal this decision and it is final as a matter of law. Cal. Pub. Util. Code Section § 1709.

---

[4] PGandE disputes Hydropool's eligibility for QF status, as well as its eligibility, apart from the present controversy, for the Interim Solution. The CPUC has not needed to rule on those questions, and they remain issues to be resolved in the event the case is remanded.

[5] Hydropool's assertion that the Commission has already rejected these arguments (J.S. 32n) is not correct. The Commission has not ruled on these questions and they remain outstanding issues. Furthermore, only the seven Standard Offers tendered by Hydropool on November 16, 1984 are part of the record in this case. Cal. Pub. Util. Code § 1757.

On September 18, 1985, the CPUC issued Decision No. 85-09-058 granting PGandE's Petition to exclude from the Interim Solution out-of-area QF projects proposing to connect to the Intertie north of Round Mountain Substation and ordering that a separate proceeding be established to determine prices to be paid for QF power delivered over the Intertie.[6] App. H. On October 18, Hydropool petitioned for rehearing, and on January 16, without waiting for CPUC action, filed a Petition for Writ of Review in the California Supreme Court.

On February 5, 1986, the Commission issued Decision No. 86-02-033 denying Hydropool's Petition for Rehearing and modifying Decision No. 85-09-058. App. H. In that Decision the Commission stated that it had never previously considered the issue of QFs connecting directly to the Intertie and noted that the avoided costs contained in the Standard Offers were never intended to be used by such QFs. Therefore, the Commission stated, Hydropool was never eligible for a Standard Offer No. 4.

On July 30, 1986, the California Supreme Court denied Hydropool's Petition for Writ of Review. J.S. App. A.

SUMMARY OF ARGUMENT

Pursuant to PURPA, 16 U.S.C. § 824a-3, the rules of the Federal Energy Regulatory Commission ("FERC") implementing PURPA, 18 C.F.R. § 292.401(a), and the FERC itself, the CPUC alone has the authority to determine the avoided costs under which QFs are paid for their power. The CPUC acted pursuant to this delegation when it opened a proceeding to determine for the first time the proper avoided costs for out-of-area QFs such as Hydropool which seek to connect on transmission lines used for the import of inexpensive energy. The CPUC recognized that in setting avoided costs in the past, it had never specifically considered cases such as Hydropool's.

At all times, the CPUC acted pursuant to its specific authority under a federal statute which left considerable authority to the states. The remedy which Hydropool seeks would disrupt this

---

[6] In November, 1985 the Commission issued Order Instituting Investigation No. 85-11-008 to begin that process. App. D.

carefully constructed system and eviscerate the state's authority specifically delegated to it by federal law.

Contrary to Hydropool's contention, the CPUC decision does not impermissibly burden interstate commerce, either on its face or in practical effect. The exclusion of which the Hydropool complains applies with equal force to QFs in California located outside of PGandE's service territory. Moreover, the CPUC's action passes all applicable tests because Hydropool's project would have a demonstrably disproportionate impact on ratepayers. Therefore, there is a reason to treat Hydropool's product differently, apart from its state of origin, and the actions of the CPUC withstand even the stricter scrutiny which Hydropool incorrectly alleges should apply.

The CPUC has not unconstitutionally impaired Hydropool's purported contracts because no such contracts existed. Not required by PURPA, the Standard Offer is solely the creation of the Commission, which alone determines which QFs are eligible for it. Hydropool's case is not an example of retroactive interference by a regulatory body because the regulatory body at all relevant times deemed Hydropool ineligible to tender a Standard Offer. Furthermore, Hydropool's own actions demonstrate its ineligibility for the Standard Offer in question.

Finally, this appeal must be dismissed because the CPUC has opened a proceeding in which Hydropool will have the opportunity to obtain the relief it seeks.

Accordingly, there are no significant federal or constitutional issues here and there is no reason to note probable jurisdiction.

I

THE COMMISSION ACTED PURSUANT TO ITS EXCLUSIVE AUTHORITY UNDER PURPA.

A. PURPA Delegates To State Commissions The Determination Of Prices To Be Paid To QFs.

Hydropool argues that the Commission has violated PURPA and the Commerce Clause by refusing to require PGandE to purchase its power on the same terms and conditions under which

PGandE must purchase power from California QFs. However, there is no Commerce Clause issue here. The sole issue is whether the CPUC, pursuant to the authority delegated to it under PURPA and the FERC rules implementing PURPA, has the authority to determine the appropriate avoided costs. An unbroken line of authorities demonstrates that such power is properly delegated to the states and will not be reviewed by FERC.[7] Accordingly, Hydropool's Commerce Clause claim must fail in the face of this unambiguous delegation.

Under PURPA and the FERC rules implementing PURPA, the CPUC has jurisdiction to determine the price at which utilities purchase QF power. 16 U.S.C. § 824a-3(f), 18 C.F.R. § 292.401. Decision No. 85-09-058 excludes Hydropool from the Interim Solution because the prices contained in Standard Offer No. 4 may not be the proper prices for out-of-service area QFs connecting to the Intertie. Moreover, that decision establishes a proceeding to determine how and under what terms QFs *can* connect to the Intertie.

The new proceeding, OII 85-11-008, is an appropriate exercise of the Commission's authority to determine the proper avoided costs for payments to QFs:

> QFs located in the Pacific Northwest, the Southwest, and California's Imperial Valley want to wheel power to California utilities and take advantage of higher avoided cost rates than are offered by utilities in their regions. However, the actual avoided costs paid to out-of-service area and out-of-state QFs may differ from the avoided costs paid to other California QFs. If QFs wheel power over interties, their power might displace economy energy purchases which would cause economic harm for California's ratepayers. Maintaining ratepayer indifferences, as a result of accurate avoided cost, may require additional curtailment provisions or a different pricing structure than is available to in-service area QFs. App. D 1.

---

[7] States must comply with the principles set forth in the FERC rules and may not, for example, set rates above avoided costs. That, however, is not an issue in this case.

Hydropool's suggestion that simply because its projects are located out of state that somehow the Commission loses its authority to determine the proper prices for Hydropool's power is totally without foundation.

This determination of the proper avoided costs is clearly within the Commission's jurisdiction. FERC enacted a series of regulations to implement PURPA. The FERC regulations stated that:

> Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C. . . . Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart. . . . 18 C.F.R. § 292.401.

Pursuant to this delegation, the CPUC issued several decisions establishing prices to be paid for QFs. However, the previous CPUC decisions did not address the prices to be paid for QFs delivering over the Intertie because, as the Commission stated, the issue never came up before.[8] App. H 15.

---

[8] Hydropool argues that Decision No. 83-09-054, which adopted the prices in Standard Offer No. 4, already factored in economy energy. J.S. 17-18. That proceeding established systemwide average avoided costs and did not consider *direct* displacement of low cost power over an Intertie. Therefore, Decision No. 83-09-054 does not apply to the type of transaction Hydropool proposes. App. H 15.

When a utility purchases QF power from within its service area, that purchase typically displaces the utility's most expensive alternative source of generation. This is the basis for the standard avoided cost pricing. When, on the other hand, the utility purchases QF power from outside of its service area over a transmission line which is fully utilized, that purchase will displace purchases the utility would otherwise have made over that line. Since the utility will generally only have been making the displaced purchases if they are cheaper than its most expensive alternative, the true avoided cost of the displaced purchase will generally be less than the avoided cost of a purchase from a QF within the utility's service area. This is the basis of the investigation ordered by the CPUC in OII No. 85-11-008.

While states were obliged to implement these regulations, FERC stated this was not to be a one-time-only or static process:

> These rules afford the State regulatory authorities and nonregulated electric utilities great latitude in determining the manner of implementation of the Commission's rules, provided that the manner chosen is reasonably designed to implement the requirements of Subpart C. . . . The Commission also recognizes that economic and regulatory circumstances vary from State to State and utility to utility. (45 Federal Register pp. 12230-12231, February 25, 1980.)

Furthermore, FERC noted that PURPA does not require that all QFs be paid the same rate:

> Since the price to be paid for the purchase by the utility is dependent, in part, on the utility's avoided costs, and these costs will vary over time and with the number and magnitude of cogeneration arrangements previously entered into, the *rates paid will probably have to differ from one arrangement to another* depending on when they were entered into and what future costs are being avoided. [Emphasis added. 44 Federal Register, p. 38870, July 3, 1979; see also 18 C.F.R. § 292.304(c)(3)(ii).]

Therefore, the CPUC acted in accordance with the FERC regulations when it determined that connection of a QF to the Intertie was a situation which it had not formerly envisioned:

> The record nowhere indicates and, in fact, *contradicts* any notion that either the Commission, the Commission staff, the respondent utilities, or any QF *ever contemplated* that our Standard Offers applied to such interconnection, particularly in such circumstances. We do not know whether the institutionalized avoided cost of Standard Offer 4 is appropriate for a situation where, because of the Intertie interconnection, a QF's power of necessity will always displace

---

The CPUC denied Hydropool's claims that low cost power was already reflected in avoided costs (App. H 15); the CPUC, which set these prices, ought to know what it considered in issuing Decision No. 83-09-054.

> economy power from the Northwest whenever such power is available to fill PG&E's capacity entitlement. We do not believe PURPA requires such a result, without convincing evidence that PG&E's avoided cost in such a situation is indeed equivalent to the Standard Offer 4. App. H 15.

Thus the CPUC's establishment of a proceeding to determine whether different prices might apply for out-of-service area deliveries over the Intertie such as Hydropool proposes was totally in accord with PURPA.

The primary role of the states in implementing these regulations is undisputed. *FERC* v. *Mississippi* 456 U.S. 742, 751 (1982). As this Court noted, the FERC regulations "afford state regulatory authorities . . . latitude in determining the manner in which the regulations are to be implemented." *Id.* at 751. That case also holds that PURPA delegates to the states the adjudication of "disputes arising under the statute." *Id.* at 760. In short, the CPUC is *correctly* implementing PURPA by establishing a proceeding to determine the proper avoided costs.

American Paper Institute v. *American Electric Power* 461 U.S. 402 (1983), cited by Hydropool (J.S. 10) for the proposition that PURPA requires "special incentives and assurances" for QFs provides little support for Hydropool. First of all, *American Paper Institute* held only that the full avoided cost rule "would not directly provide rate savings" to customers. *Id.* at 415. It does not permit or require increased costs to customers. Second, the Interim Solution, adopted as a Commission order in Decision No. 84-08-037, already acknowledges that ratepayer costs *without Hydropool* will be increased. App. A 4. Hydropool cannot seriously suggest that *American Paper* deprives the CPUC from determining that there be a limit to the increased costs.[9]

---

[9] The CPUC's standard in setting QF prices is ratepayer indifference; that is, the ratepayers should be indifferent as to whether a QF supplies the power or a utility supplies the power. The Interim Solution (without Hydropool) departs from this standard by increasing ratepayer costs in order to obtain the benefits of QF power. Thus, without Hydropool, the Interim Solution is already consistent with the dicta in *American Paper*

In addition, *American Paper* stated that the primary purpose of PURPA was to decrease dependence on fossil fuel. *Id.* at 405. The power which Hydropool would displace is primarily hydroelectric power from the Northwest. App. B 2-3. Thus, there is no energy independence issue here.

In sum, the CPUC can determine the avoided costs to be paid for out-of-area projects delivering over the Intertie.

B. The Order Complies With The FERC's Requirements.

In promulgating its rules pursuant to PURPA, FERC delegated to state commissions the determination of the "avoided costs" on which QF payments were to be based. The FERC guidelines require neither that all payments be equal nor that standard offers be made available.

FERC described this delegation in *Middle South Services, Inc.*, 24 FERC ¶ 63,119, p. 65,209 (1982):

> Pursuant to Section 210(f) of PURPA, after the Commission's regulations have been issued, the duty falls upon each state regulatory authority, having jurisdiction over electric utilities for retail ratemaking purposes, to implement the regulations (citations omitted). It is a state regulatory authority, in the absence of a negotiated price agreement, which will ultimately determine the price to be paid by a utility to a qualifying facility for a purchase of electricity occurring in that particular state.
>
> The Commission's regulations, which endeavor to spell out the meaning of avoided costs, leave a lot of room for play in the joints. Each state authority, therefore, has wide discretion in weighing the factors specified in the regulations to determine avoided costs. (*See also*, 33 FERC ¶ 61,408 [1985].)

FERC has constantly refused to review the state's determination of prices paid to QFs. *Vermont Electric Cooperative, Inc.* v.

---

that PURPA does not necessarily reduce ratepayer costs. The question is whether the CPUC can say enough is enough.

Vermont Public Service Board, 25 FERC ¶ 61,273 (1983); *Roche Products, Inc.*, 29 FERC ¶ 61,098 (1984).

FERC also refused to intervene in a case similar to this one in that the state regulatory body ordered a specific set of avoided costs applied to a particular transaction because the QF proposed to displace a specific power source. *Snow Mountain Pine Company* v. *C.P. National Corporation and Idaho Power*, 30 FERC ¶ 61,293 (1985).

Therefore, any suggestion by Hydropool that the CPUC exceeded its authority in denying Hydropool Standard Offer 4 prices under the Interim Solution must be rejected.

II

DECISION NO. 85-09-058 DOES NOT ILLEGALLY BURDEN INTERSTATE COMMERCE.

Hydropool also claims that the CPUC unlawfully burdened interstate commerce by refusing an out-of-state QF the same terms offered to in-state QFs. This claim cannot be sustained by either the facts or the law.

This Court recently summarized the standard for determining whether a state action violates the Commerce clause:

> In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," . . . statutes in the second group are subject to more demanding scrutiny. . . . [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. *Maine* v. *Taylor*, 106 S.Ct. 2440, 2447-8 (1986)

The order from which Hydropool appeals at most burdens interstate commerce only incidentally. Moreover, the burden, if any, is not excessive relative to the local benefits.

A. No Distinction Was Made On The Basis Of Location In Or Out Of State.

Contrary to Hydropool's allegation, neither the Interim Solution as drafted nor PGandE's Petition for Modification (granted by Decision No. 85-09-058) made a distinction based on a QF project's location in or out of state. Rather, the distinction was based on location outside of PGandE's control area (which comprises much of Northern and Central California, but is hardly the entire state). That petition requested that:

> The interim solution will not apply to QFs located outside of PGandE's service territory whose output would flow on the Pacific Northwest-Southwest 500 kv intertie north of Round Mountain substation. J.S. App. N 5.

The Interim Solution also excluded QFs within California whose connection would expose ratepayers to excessive costs.[10]

Hydropool, incorrectly focusing on its own desired transmission path rather than on the actual terms of the order, argues that this restriction is a carefully drafted attempt to exclude out-of-state QFs without stating so directly. J.S. 25, Hydropool is wrong on the intent and wrong on the geography. The requested modification sought to accomplish exactly what it states—to exclude out-of-area QFs who want to connect directly to the Intertie regardless of state of origin. Round Mountain substation is located nearly 100 miles south of the Oregon border. J.S. App. U. Therefore QFs in the Northern tier of California (including Siskiyou, Del Norte, and Modoc Counties), but located outside of PGandE's service territory, were similarly excluded if they wished to connect directly to the Intertie.

---

[10] Hydropool would thus have been excluded had it been located in California, but outside of PGandE's service territory and connecting on the Intertie north of Round Mountain.

Hydropool notes that the CPUC in Decision No. 85-09-058 discussed the issue of "out-of-state" QFs, and on that basis alleges that the CPUC intended to make such a distinction. However, when the CPUC pursuant to that Decision opened its investigation of the proper avoided costs for QFs delivering over the Intertie, the issue was framed not in terms of location in or out of state but, properly and consistently with PGandE's Petition for Modification, in terms of location in or out of a utility's service territory. App. D. Moreover, in modifying Decision No. 85-09-058, the CPUC left no doubt as to its intent:

> we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. App. H 15.

Hydropool's allegation that Decision No. 85-09-058 had the practical effect of an exclusion based on location out of state is incorrect. First, the exclusion also applied to California QFs.[11] Second, the Intertie is not the only connection with Oregon.[12] App. B 9-10.

Accordingly, the Decision did not discriminate against interstate commerce either on its face or by practical effect.

B. Even If Distinction Based On Location In Or Out Of California Can Be Established, There Are Countervailing Local Benefits.

Assuming *arguendo* that the Commission's actions have the incidental effect on interstate commerce alleged by Hydropool, that action "will be upheld unless the burden imposed on such

---

[11] No QFs in PGandE's service territory were connected directly to the Intertie (App. B 7), nor does the record show that any QFs in PGandE's service territory are permitted to connect directly to the Intertie under the Interim Solution.

[12] It may be the only practical connection for Hydropool, but that is not the point. The question is not whether Hydropool can connect, but whether out-of-state QFs were excluded based solely on location.

commerce is clearly excessive in relation to the particular local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Commission's actions, in balancing the interests of the 10,000,000 residents of PGandE's service territory against a single entrepreneur, clearly meet that test. The Commission, in using "scarce interstate transmission resources for the maximum benefit of the ratepayer" App. H 15, is properly exercising its undisputed authority under California law to ensure that utility rates are "just and reasonable." Cal. Pub. Util. Code Section 451.

This Court has consistently acknowledged the state interest in utility regulation and low rates to consumers. As this Court held in *Arkansas Electric Coop. v. Arkansas Public Service Company*, 461 U.S. 375, 377 (1983):

> the regulation of utilities is one of the most important of the functions associated with the police power of the States.

Similarly, in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), this Court noted:

> The passthrough prohibition plainly bore a rationale relationship to the *State's legitimate purpose of protecting consumers from excessive prices. Id.* at 196 (Emphasis added).

The interest of the states in utility regulation is not diminished by PURPA. As this Court acknowledged, PURPA "*permits* the States to play a continued role in the utilities field, and gives full force to the States' ultimate policy choices." *FERC* v. *Mississippi*, *op. cit*, *supra* at 754n.[13]

---

[13] Hydropool also alleges that the decisions of the CPUC frustrate national energy policy. But national energy policy is comprised of more than just QFs and PURPA. The transmission line over which Hydropool seeks to force PGandE to accept its overpriced power is a congressionally authorized line designed to import inexpensive energy to California. Most of that energy comes from the Bonneville Power Administration, a federal agency. App. B 2-3. The enhanced transmission capability over the Intertie, to which Hydropool alludes, is also being pursued pursuant to federal directive and may not be economically justified (and therefore may not be built) if its owners are forced to take high cost power rather than low cost power. App. B 6.

Therefore, the local benefits considered by the CPUC justified its actions.

Similarly, this Court held:

> A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause. *Minnesota* v. *Cloverleaf Creamery*, 449 U.S. 456, 474 (1980).

In that case, this Court concluded that any burden on interstate commerce was not excessive since the product would still flow across state lines. In this case, power will still flow across state lines so interstate commerce is not burdened.

Hydropool cites *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982), as support for the proposition that protecting ratepayers from higher rates is not a legitimate local purpose. J.S. 52. However, *New England* does not support Hydropool's argument.

New England holds that a state cannot keep limited natural resources for the benefit of its own citizens. *Id.* at 338-39. However, in this instance the Commission is not barring anything from entering or leaving the state. Hydropool can sell power to PGandE from its projects App. H 14; the issue is the appropriate terms for the transaction. To be analogous to the state action struck down in *New England*, the Commission would have had to limit a party's right to contract under any circumstances for the sale or purchase of power.

C. There Can Be No Commerce Clause Violation Where, As Here, There Is A Reason To Treat Hydropool's Power Differently Apart From Its Origin.

Hydropool suggests that the CPUC's actions was motivated by economic protectionism to develop California's own small power industry to the detriment of developers in other states. J.S. 52.

When economic protectionism is the motive for a ban on imports, the action will be deemed invalid *per se*. *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). However, the law must be examined to determine whether the motive is economic protectionism or whether it is a law directed at legitimate local concerns with only an incidental effect on interstate commerce. A state may not discriminate against articles of commerce coming from outside the state "unless there is some reason, *apart from their origin*, to treat them differently." *Id.* at 627 (emphasis added). Where, as here, the exclusion is due to a reason unrelated to state of origin—namely, differential displacement of economy energy—the statute is merely subject to the local benefit test. *Id.* at 624.

When economic protectionism is *not* the motive, a state statute is not necessarily invalid (or subjected to a stricter scrutiny) even if as a practical matter it burdens only out-of-state entities. *Exxon* v. *Governor of Maryland*, 437 U.S. 117 (1978). In that case, this Court affirmed a Maryland statute requiring all refiners to divest themselves from ownership of Maryland retail gas stations. The refiners termed this statute an impermissible burden on interstate commerce because all refiners who owned retail stations were in fact interstate companies. *Id.* at 125. This Court rejected that argument, holding that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id.* at 127.

Hydropool's situation is analogous. Since there is limited capacity on the Intertie, any power not supplied by Hydropool will be supplied by other, in this case lower cost, interstate suppliers. As *Exxon* held, the Commerce clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-128.[14]

---

[14] Hydropool's claim that its participation would enhance the interstate power market (J.S. 44) ignores the fact that it is seeking to impose on PGandE's ratepayers power at prices far in excess of market value while ironically displacing market-priced power.

Even if the burden of regulation falls solely on interstate companies the Court has found that that fact alone does not lead to conclusion that a state has discriminated against interstate commerce. *Id.* at 125. Accordingly, even assuming Hydropool has demonstrated a distinction in practical effect, the Commission did not violate the Interstate Commerce Clause.

1. Even Under Stricter Scrutiny, The Decision Of The Trier Of Fact Will Not Be Disturbed.

Because the CPUC's actions neither discriminated against out of state companies nor were motivated by economic protectionism, the stricter test mandated by *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979) does not apply. However, even under that stricter scrutiny, the Commissioner's actions will be upheld.

Under *Maine* v. *Taylor*, if a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate soon that action serves a "legitimate local purpose" and that this purpose could not be served as well by available nondiscriminatory reasons. *supra* at 2448. However, "[t]he empirical component of that scrutiny, like any other form of fact finding, is the basic responsibility of the [trial] courts, rather than appellate courts." *Id.* at 2451. The Commission provided the factual basis for granting PGandE's Petition for Modification. App. H 14-15, 19-26. Moreover, under California law, the "findings of fact by the Commission are to be accorded the same weight that is given to jury verdicts." *Toward Utility Rate Normalization* v. *Public Utilities Commission*, 22 Cal.3d 529, 537-38 (1978); *see also*, Cal. Pub. Util. Code § 1757. As this Court held in *Maine* v. *Taylor*, "no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case." *Id.* at 2451.

2. The Commission Established A Clear Factual Basis For Treating Out-Of-Area Projects Differently

Notwithstanding the unambiguous holding that this Court will not relitigate the facts in exercising even the stricter scrutiny in Commerce Clause analysis required in *Maine* v. *Taylor* (where, unlike here, there was an outright ban on out of state imports),

Hydropool attempts to minimize the significance of the Commission's factual basis for distinguishing between Hydropool and QFs within PGandE's service territory.

The Commission correctly established a factual basis on which to treat Hydropool and other out-of-area QFs differently. Contrary to Hydropool's claim that in-state QF power will also flow on the Intertie and have the same effect (J.S. 6) QFs connecting within California will not have the same detrimental effect on ratepayers as would Hydropool. Furthermore, the ALJ ruling is not based on a minor technical issue (J.S. 48); it addresses the differential displacement caused by Hydropool's projects and is the central issue in this case.

Hydropool argues that the ALJ, having made this distinction, did not recommend Hydropool's exclusion. J.S. 36-7, 46. However, a CPUC Administrative Law Judge lacks the authority to make a dispositive ruling, but may "rule upon all objections or motions which do not involve final determination of proceedings." Title 20, Cal. Admin. Code § 63. Therefore, the ALJ exercised his lawful authority in referring the matter to the full Commission.

Hydropool asserts that in-state QFs are as likely to displace economy power as Hydropool (J.S. 6, 46). However, the record clearly demonstrates that Hydropool will cause greater displacement. First, any displacement of economy energy caused by Interim Solution projects would at worst be temporary until the specified transmission upgrades are completed in five to seven years. Displacement caused by Hydropool will continue throughout the twenty-year life of the Hydropool contracts, not just for five to seven years. When the specified upgrades are completed, the Interim Solution QFs will not cause any diseconomic operation. App. B 8. Hydropool's assumption as to additional Intertie capacity must be rejected; any such capacity may well not be built if it cannot be used for low cost power.

Second, Hydropool's projects will cause displacement at least in the spring every year assuming average year hydro conditions and for longer periods of time in above average hydro conditions. App. H 24-25. Hydropool's estimated figures of PGandE's usage

of the Intertie was determined on the basis of average utilization over the course of an entire year, ignoring the periods in which the Intertie would be totally utilized and during which Hydropool's projects would displace economy energy on a one-for-one basis. Hydropool's witness conceded "there could be additional backoffs on the Intertie from a QF that was connected to it." App. B 4-5.

Therefore, there was sufficient evidence for the Commission to find that Hydropool's projects would cause a greater backdown of low cost power than would QFs under the Interim Solution.

Moreover, projects under the Interim Solution would not have an equal effect. PGandE has alternatives which could reduce the backdowns of low cost power caused by Interim Solution projects. PGandE "would look at a combination of measures cutting back our own generation within the northern area and/or cutting back on Northwest imports." J.S. App. X 371. With Hydropool's projects, PGandE has no alternatives but to back down cheaper power.

PGandE further demonstrated that in-area QFs would at the most displace only 0.15 MW of low cost power for each 1.0 MW they generate, while Hydropool would displace as much energy as it generates. The 1150 MW of QFs under the Interim Solution are distributed all over PGandE's northern divisions. Only a small portion affects the Intertie flow south from Round Mountain Substation.[15] Therefore, Hydropool would displace seven times as much low cost energy as would the in-area QFs under the Interim Solution.

---

[15] In the circle insert in Ex. 20, Attachment 2 (App.E), 12 MW flows through the Round Mountain transformer bank from the 500 kV bus *to* the 230 kV bus with only the existing 196 MW of northern QFs. In Attachment 4, with an aditional 1150 MW of QFs (1346 MW total), the power flow reverses and 163 MW flows from the 230 kV bus to the 500 kV bus. This means that adding 1150 MW of QFs add 175 MW (12 MW + 163 MW) to the Intertie flow south from Round Mountain Substation. In other words, each MW of QF added under the Interim Solution displaces only about 0.15 MW (175 ÷ 1150 MW) of economy energy import.

Hydropool alleges that the Commission's actions must be deemed invalid for failure to pursue "available nondiscriminatory alternatives." *Maine* v. *Taylor*, *op. cit*, *supra*, at 2448. J.S. 36, 50. In fact, PGandE offered an alternative point of interconnection to Hydropool which it rejected for its own business reasons. App. B 11-13. Moreover, whatever the merits of Hydropool's own proffered (and preferred) alternatives, its proposals for banking and curtailment are inconsistent with its assertion that it has a constitutional right to a non-negotiable agreement which lacks these terms.

Finally, the Commission provided an available nondiscriminatory alternative in opening OII 85-11-008 to determine the appropriate terms and conditions for purchases from out-of-area QFs. In that proceeding Hydropool will be able to propose a standard offer or the banking and curtailment offer proposed above. This constitutes a "reasonable effort" to accommodate Hydropool. *Maine* v. *Taylor*, *Id.* at 2453. *Maine* v. *Taylor* does not require a state to choose between the lesser of two non-negotiable offers and specifically rejected as not falling within the ambit of an "available nondiscriminatory alternative" a proposal which was new, unproven, and, like Hydropool's vague offer, contained an "uncertain cost." *Id.*

In sum, the stricter scrutiny required by *Maine* v. *Taylor*, where an outright import ban was nevertheless sustained, should not even be necessary in this case. However, even assuming that such a scrutiny is appropriate, the CPUC's actions do not violate the Commerce Clause.

III

THE CPUC DID NOT IMPERMISSIBLY IMPAIR ANY CONTRACTS.

Hydropool's second claim is that the CPUC unconstitutionally impaired existing contracts between PGandE and Hydropool. However, no such contracts ever existed. Even if Hydropool had contracts with PGandE, in the context of the highly regulated electric utility industry, the CPUC's action was acceptable.

A. No Contracts Between PGandE And Hydropool Existed.

Under modern Contract Clause jurisprudence, the first determination is whether the state action actually impairs a contractual relationship. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978); *United States Trust* v. *New Jersey*, 431 U.S. 1, 17 (1977). Obviously, if the "contract" allegedly affected by the state action does not exist, there has been no impairment.

Although normally the question of whether a contract exists is one of state law, when a state statute is challenged as an unconstitutional impairment of contract, the question of whether the contract exists becomes a federal one. *Atlantic Coast Line* v. *Phillips*, 332 U.S. 168, 170 (1947); *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942). This is true whether the contract arguably in existence is created by state action and runs directly between the state and some other party (*Phillips*, *supra* at 169-70) or is a private contract (*Irving Trust*, *supra* at 557-60).

Even where the state is one of the contracting parties, this Court defers to the state's view:

> when we are dealing with a matter of local policy . . . we should be slow to depart from the [local court's] judgment, if there was no real oppression or manifest wrong in the result. . . . It is not for [this Court] to read such a local law with independent but innocent eyes, heedless of a construction placed upon it by the local courts. *Phillips*, *supra* at 170.

The Commission's view on whether contracts in fact existed between Hydropool and PGandE is therefore entitled to some deference from this Court. Deference is more appropriate in this case, where the alleged contracts are between two private parties, than in *Phillips*. There is less reason to treat the state's determinations with suspicion when, as here, the state does not have a direct financial interest in the matter. *Energy Reserves Group, Inc.* v. *Kansas Power & Light*, 459 U.S. 400, 412 n. 14 (1983).

1. Hydropool Did Not Obtain Standard Offers Because Its Projects Were Not Eligible For Standard Offers.

The Standard Offer which forms the basis of Hydropool's contract clause claim was created by the Commission to facilitate

power sales by eligible QFs to California utilities. J.S. App. C. Any resulting agreements are not the result of a true meeting of the minds between the QF and the utility. Rather, the Commission requires that the Standard Offers be offered by the utility to eligible QFs. They are deemed by the Commission to be binding once the eligible QF has completed the Standard Offers correctly and fulfilled certain other requirements. J.S. App. K.

In this case, no contracts were ever formed. PGandE at all times disputed Hydropool's eligibility for the Standard Offers and the Commission determined Hydropool ineligible. App. H 14. Even Hydropool acknowledged when it tendered the Standard Offers that their validity depended on the resolution of the underlying dispute. As Hydropool's letter purporting to transmit the seven Standard Offers states: "As previously mentioned, we are willing to make the power purchase agreements final, *subject to* a decision from the PUC regarding PGandE's petition for modification of Decision 84-08-037." (emphasis added) App. F 3.

Hydropool's contract claim is based on events in another CPUC proceeding. In April, 1985, the Commission suspended Standard Offer No. 4 because under it ratepayers were required to pay too much for QF power. Hydropool petitioned for modification of the suspension order, requesting that Hydropool's tendered Standard Offers be exempted from the suspension if Hydropool was otherwise permitted to connect in OII No. 84-04-077, an event that never came to pass. App. C 6. Hydropool was concerned that otherwise it might have litigated its case on the merits in OII No. 84-04-077 in vain because of the suspension. Specifically, Hydropool asked the CPUC to:

> modify D. 85-04-075 to provide that the suspension of Standard Offer 4 does not apply to the fourteen Hydropool projects totaling 66.2 megawatts; and that interim Standard Offer 4 *may* be available to them upon a decision in Case No. I.84-04-077 denying PGandE's Petition for Modification of D.84-08-037. (emphasis added.) App. C 6.

Obviously, by *granting* PGandE's Petition for Modification of Decision No. 84-08-037, rather than denying it, the CPUC found that the tendered Standard Offers were not valid.

The Commission has never held that the Hydropool contracts were valid. It stated repeatedly that:

> The status of any interim Standard Offer 4 agreements tendered by Cogenerations Services, Inc. and Hydropool to PG&E prior to April 17, 1985, *shall be determined by the outcome of the Commission's decision on PG&E's petition for modification of D.84-08-037 in I. 84-04-077.* (J.S. App. K 47, emphasis added.)

That decision is now final and is res judicata in this proceeding.[16] Cal. Pub. Utilities Code § 1709.

Notwithstanding Hydropool's specific exclusion from the general ruling of Decision No. 85-06-163, Hydropool continues to argue that the decision nevertheless created a right which was unconstitutionally abrogated. That position was dismissed by the CPUC:

- We stated in D.85-06-163, the Orphan Contracts decision, that resolution of PG&E's Petition to Modify would determine the ability of Hydropool to enter Standard Offer 4 agreements with PG&E. Our decision to grant PG&E's Petition means, of course, that Hydropool does not have the ability to enter Standard Offer 4 agreements under the terms of the interim solution, as long as its interconnection is through the Intertie. App. H 14.

Clearly, Hydropool never had a right to tender a Standard Offer. Therefore, it cannot now argue that the Standard Offers it submitted created contracts which were later abrogated.

---

[16] Hydropool argues that the Commission singled it out for different treatment in this decision, J.S. 30. Hydropool fails to note that it requested that it be treated differently.

2. Hydropool Has No Contract Because Standard Offer Forms Cannot Be Used For Out-Of-Area QFs And Hydropool Wanted To Vary The Terms Of The Standard Offer.

Even if Hydropool were eligible under the relevant Commission decisions for Standard Offer No. 4, the forms submitted to PGandE did not create contracts between Hydropool and PGandE because Standard Offer forms cannot be used for out of area projects for technical problems independent of the underlying dispute and because Hydropool itself proposed to deviate from the Standard Offers.

a. Standard Offer Forms Are Inappropriate For Out-Of-Area Projects Such As Hydropool's.

Hydropool's submitted Standard Offers are not binding because those forms are inappropriate for out-of-area projects. Hydropool admitted these tendered offers were nothing but placeholders in anticipation of a suspension. App. B 111. Because purchase agreements with out-of-area projects necessarily involve unique issues of scheduling, metering, and interconnection, non-standard contracts must be separately negotiated which deal with these issues. As PGandE informed Hydropool

> You also state in your November 26 letter that you recognize the need for additional "agreements" between Hydropool and PGandE to address these circumstances that are unique to delivery of wheeled power to Malin (i.e., metering, scheduling, etc. . . .), rather than direct interconnection to the PGandE transmission system. This is essentially correct, although those "agreements" must be embodied in the Power Purchase Agreements and not in separate documents. For that reason, a standard power purchase agreement is not workable for out-of-area projects. J.S. App. T 2.

Accordingly, these forms could not be used for out-of-area projects.

b. The Standard Offers Were Not Applicable Because Hydropool Had Requested Nonstandard Offers.

Finally, Hydropool has not accepted a Standard Offer because at all times Hydropool has wanted something other than a Standard Offer. The only contract that is available to an eligible QF without negotiation is a Standard Offer as approved by the CPUC. Even the slightest change to a Standard Offer renders it nonstandard, and no longer available to a QF at the QF's option. App. G 4. Hydropool wants a nonstandard offer, whereby output would be "banked and stored." J.S. 36, 50. Whatever the merits of Hydropool's offer, its terms are inconsistent with the Standard Offers, which do not permit such flexibility.

Because of inadequacies in the documents themselves when used for out-of-area QF projects and Hydropool's expressed desire to obtain nonstandard terms, Hydropool's submitted Standard Offers did not create contracts between PGandE and Hydropool.

B. Even If Hydropool's Submittal of Standard Offers Created Binding Contracts, The Commission's Actions Have Not Unconstitutionally Impaired Those Contracts.

Assuming *arguendo* that a contract exists, in considering a Contract Clause challenge to a state action, the court must determine whether the complained of state action actually impairs the existing contractual relationship. *Allied Structural Steel Co.* v. *Spannaus*, *op. cit.*, *supra* at 244; *United States Trust* v. *New Jersey*, *op. cit.*, *supra* at 17

If it does, then in order to survive a Contract Clause challenge, the "'[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption'." *Spannaus*, *op. cit.*, *supra* at 244 (citing *United States Trust*, *op. cit.*, *supra* at 22). If the state regulation constitutes a substantial impairment, the State must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic prob-

lem. *Energy Reserves Group, Inc.* v. *Kansas Power & Light, op. cit., supra* at 411-12.

In determining the extent of the impairment, the Court considers whether the industry the complaining party has entered into has been regulated in the past. *Id.* at 411. Unless the state itself is a contracting party, this Court defers to the legislative judgment as to the necessity and reasonableness of a particular measure. *Id.* at 412-13.

1. California's Actions Protect Significant And Legitimate State Interests.

California's action here unquestionably protects significant and legitimate state interests. The Commission, by not allowing Hydropool's projects to interconnect to the Intertie under Standard Offer No. 4, was protecting the state's ratepayers from an unintended increase in energy prices. Protecting ratepayers from excessive rates is a significant and legitimate state interest. *Id.* at 416-17.

2. The Two Modern Cases In Which A Contract Clause Challenge Was Successful Are Distinguishable From The Present Controversy.

United States Trust Co. v. *New Jersey, op. cit., supra*, and *Allied Structural Steel Co.* v. *Spannaus, op. cit., supra*, are the only two modern cases in which a Contract Clause challenge to a state action was successful. Both cases are easily distinguishable from the present controversy.

In *United States Trust* the state itself was a contracting party. If one of the contracting parties is the State, it is very likely that the Court will hold a State to its contractual obligations. *Energy Reserves, op. cit., supra* at 412 n. 14. Here California is not a party to the contracts. Therefore, deference to California as to the necessity and reasonableness of its action is appropriate. *Id.* at 412-13.

In *Spannaus* the objectionable feature of the Minnesota legislation, which was intended to protect employees in the state, was that it affected only a small subset of employers. *Spannaus, op. cit., supra* at 250. The legislation caused the pensions of certain employees to vest sooner than they otherwise would have, but did

not affect employers who provided no pension plan whatsoever, or offer any protection for their employees. Thus the legislation was ironically more likely to harm those employers who had made some attempt to protect employees already. *Id.* at 250.

Here, on the other hand, California's goal is to protect a broad social interest, the ability of a significant portion of the state's ratepayers to obtain fair electric rates. Further, those affected by the Commission's actions, such as Hydropool, are those who would most directly cause the problem.

In its attempt to gain this Court's attention, Hydropool purports to demonstrate that there are some current issues in contract law which this Court must resolve. However fascinating these issues may be in the abstract, this is hardly the case in which to resolve them, when, as here, the facts so overwhelmingly demonstrate that no contract exists, that the CPUC has properly determined that Hydropool is ineligible for the contract in question, and that the contract in question was never intended by any of the parties to this proceeding, including the appellant, to govern this transaction.

IV

THIS APPEAL MUST BE DISMISSED FOR WANT OF RIPENESS BECAUSE THERE IS AN EXISTING ADMINISTRATIVE PROCEEDING IN WHICH APPELLANTS WILL HAVE THE OPPORTUNITY TO OBTAIN A REMEDY.

Hydropool's appeal must be dismissed because it is not ripe; the issue in dispute, the price paid to out-of-area QFs wishing to deliver over the Intertie, is before the proper administrative body, the CPUC. In November 1985, the CPUC issued OII No. 85-11-008 to determine *for the first time* the proper prices to be paid for QF delivery over the Intertie. App. D. OII No. 85-11-008 is the proper proceeding (under the CPUC's authority under PURPA to establish prices paid to QFs) for Hydropool to obtain relief.

When, as here, a controversy is not ripe for adjudication because of a pending administrative proceeding, this Court must reject the appeal. *Dump Truck Owners Assn.* v. *Public Util. Comm'n*, 434 U.S. 9 (1977). In that case, this Court dismissed

an appeal of a Commission's action because the proceeding was reopened. In the instant case, the Commission has opened a proceeding to resolve the true issue here—the proper prices for QF power delivered directly over the Intertie. Therefore, Hydropool has not been foreclosed from the California marketplace and an administrative proceeding exists to determine the proper terms and conditions under which Hydropool may enter the California market.

V

CONCLUSION

For the reasons stated above, Hydropool is entitled to no relief whatsoever and its Appeal should be dismissed.

Respectfully submitted,
MICHAEL S. HINDUS
(Counsel of Record)
HOWARD V. GOLUB
MARK R. HUFFMAN

By _____ Michael S. Hindus

Attorneys for Pacific Gas and Electric Company
77 Beale Street
San Francisco, California 94106
(415) 972-2859

November 28, 1986

APPENDIX A

OII 84-04-077

STIPULATION AND ORDER

INTRODUCTION

A. On April 18, 1984, the California Public Utilities Commission ("Commission") issued Order Instituting Investigation ("OII") 84-04-077 in response to information received by it that Pacific Gas and Electric Company ("PGandE") is experiencing or expected to experience limitations on portions of its transmission system and that the limitations could restrict the ability of PGandE to accept power from Qualifying Facilities ("QFs") in areas served by those portions of PGandE's transmission system.

B. San Diego Gas and Electric Company, Southern California Edison Company, Sierra Pacific Power Company, and Pacific Power and Light have represented that they do not have, or do not expect to have significant transmission limitations affecting their ability to accept QF generation.

C. PGandE, the Commission Staff and QF representatives met on June 8, 15, and 19, 1984 to discuss the PGandE transmission system contraints. All parties involved exercised due diligence in developing the terms of the agreement which is the basis of this stipulation. No party present at the prehearing conference on June 22, 1984 objected to the use of an agreement as the basis for an interim solution. This stipulation establishes an interim solution to transmission contraints in the Northern Portion of PGandE's service area (as defined in Finding of Fact 1) to allow QF development to proceed until the Commission completes the investigation in OII 84-04-077.

D. This stipulation applies only to QFs in the Northern Portion of PGandE's service area and does not affect QFs in the other portion of the service territory nor does this order bind other California utilities.

E. The stipulation does not predetermine any of the issues in the pending OII 84-04-077, establish the position of any party during the proceeding or assign the ultimate cost responsibility for

the upgrades necessary to alleviate the transmission constraints in the PGandE service area.

F. The terms of the stipulation will be in effect from the Commission adoption of the interim decision until the final Commission determination at the completion of the investigation.

G. The QF assessment agreed upon in this stipulation will apply to all QFs signing Power Purchase Agreements and who have paid for detailed interconnection studies from the effective date of this Order until the Commission implements the cost allocation for the transmission system upgrades as determined in OII 84-04-077.

H. Any and all changes in operating practices necessary for PGandE to accept QF power are authorized until the upgrades are built which eliminate the need for such practices or until the Commission determines otherwise.

I. In order for QF development to proceed pending the Commission resolution of OII 84-04-077, QFs otherwise affected by these limitations will be assessed 1.7 mills/kwh in return for PGandE's taking the power. PGandE will be able to proceed with specified transmission upgrades with full reasonable cost recovery authorized by the Commission. PGandE will take whatever operating steps are ordered by the Commission in order to accommodate QF power deliveries during the interim period. Ratepayers will receive the longterm benefits on QF power.

J. The parties to this stipulation understand that this is a negotiated solution and that each party had to compromise in order to reach agreement.

K. The parties to this agreement respectfully request that the Commission adopt an interim order in this matter which includes the proposed findings of fact and conclusions of law attached to this stipulation:

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER

FINDINGS OF FACT

1. PGandE is experiencing or expects to experience bulk transmission constraints in the northern portion of its service area.

Under PGandE's assumptions regarding anticipated load and resources, including expected levels of QF generation, from this time forward the capacity of PGandE's northern bulk transmission facilities will be exceeded during certain hours of each year. The Northern Portion of PGandE's service area affected by this stipulation is defined in this Order as that area north of a line running from the Golden Gate to the Carquinez Straits to the Sacramento River east of Antioch and then running southeast to pass just west and south of PGandE's Bellota substation.

2. PGandE also reached similar conclusions about its area transmission system in the following six operating divisions: Humbolt, Shasta, De Sabla, Colgate, North Bay, and Drum. The area transmission systems are directly affected by the location, size, and timing of the QFs seeking to sell power to PGandE.

3. Increasing the capacity of both the bulk and certain area transmission systems (as listed in Attachments 1 and 2) is estimated by PGandE to cost approximately $185 million in 1984 dollars. The upgrades, if all are completed, are estimated by PGandE to accommodate approximately 1150 MW of additional QF development. Completion of all of these upgrades may take five to eight years.

4. This order applies only to QFs who sign or have previously signed a Power Purchase Agreement with PGandE and who pay for a detailed interconnection study between the time this order is issued and the time an order is issued in OII 84-04-077 which allocates responsibility for these transmission costs.

5. As a consequence of transmission constraints, PGandE will, at certain times, be unable to physically accommodate delivery of expected energy or capacity in addition to that already committed to by PGandE in certain areas of its transmission system. This situation can be resolved on an interim basis by PGandE undertaking operating practices which PGandE would not undertake without Commission order. This situation can be resolved in the long term by modifications and additions to the PGandE's bulk and area transmission system. Uncertainty as to their potential liability for future costs of such modifications and additions to modify or upgrade PGandE's transmission system makes it difficult for QFs to obtain project financing and, thus,

has a detrimental effect on the development of QF power in Northern California.

6. In issuing OII 84-04-077, the Commission recognized that an extensive investigation is necessary to evaluate fully all of the facts relevant to this matter before the Commission can make a final decision regarding the cost responsibility for the necessary upgrades.

7. The Commission further recognizes that without implementing an interim solution, as much as 800 MW of QF power may not be developed before the final decision in OII 84-04-077.

8. The Commission Staff, PGandE, and other affected parties have stipulated to a proposed interim solution which recommends a course of action that allows QF development to go forward pursuant to Federal and California Law and adopted Commission policy. The parties recognize the risks created by adopting an interim solution prior to completing the investigation.

9. The transmission constraints indicated above apply only to the Northern Portion of PGandE's service territory. No other respondent utility named in OII 84-04-077 falls under the terms of this interim decision. The remaining portion of the PGandE service territory is not affected.

10. The Commission and PGandE continue to support the development of QF power in California in accordance with established law and adopted policies. For this reason, the Commission finds that the benefits of QF power already identified in past Commission proceedings on this subject warrant the sharing of risk by the ratepayer for the costs incurred due to this interim solution.

11. In order to take additional QF power prior to completion of the bulk and area transmission upgrades, PGandE will have to operate its system differently from what is considered to be the most economical dispatch of resources. PGandE needs discretion to take whatever operating measures are necessary at the time. PGandE has not had experience with implementing such measures to accept QF power, so the increase in energy costs which may result from these measures has not been established. PGandE's implementation of any or all of these measures to take

QF power in the interim until the bulk and area transmission upgrades are built shall be presumed reasonable in the annual ECAC review. PGandE will report in its annual ECAC review what steps were necessary to take QF power.

12. PGandE agrees to evaluate expeditiously the bulk transmission system upgrades identified in Table 1 of PGandE's June 1 response to the information requested in OII 84-04-077 (appended as Attachment 1) as well as the Feather River 230 kv system with the intent of preparing Applications for Certificates of Public Convenience and Necessity which are required before those upgrades can be built. If PGandE is unable to build any part of the upgrades because of legislative, judicial, or regulatory action, PGandE will inform the Commission and use its best efforts to propose a course of action that will allow PGandE to continue to accept QF power under contract.

13. PGandE agrees to begin the process of building the area transmission upgrades identified in Table 2 of PGandE's June 1 response to OII 84-04-077 (appended as Attachment 2) with the exceptions of the upgrades listed for Humboldt and Drum Divisions and the Pit 1 System in Shasta Division. These exceptions will be deferred until the completion of the OII. In addition, the Feather River 230 kv System requires an Application for Certificate of Public Convenience and Necessity as described in Finding of Fact 11. If there are projects in these areas currently in licensing procedures before FERC, at the request of the license applicant, PGandE and the CPUC will inform FERC of the current investigation and request that FERC grant an appropriate extension of time.

14. All area system upgrades constructed by PGandE (except the Feather River 230 kv line which requires a separate Application) will be reviewed for inclusion in rate base in the next General Rate Case following their completion to determine only that these upgrades were necessary in order to physically accommodate QF power or for other reasonable and prudent reasons and that the expenditures were reasonable.

CONCLUSIONS OF LAW

1. This interim decision does not predetermine any of the issues in the pending OII 84-04-077 regarding potential transmission constraints of California electric utilities in relation to the development of QF power.

2. San Diego Gas and Electric, Southern California Edison, Sierra Pacific Power and Pacific Power and Light are not bound by this Order.

3. The conclusions drawn as a basis for this interim decision do not bind any of the parties insofar as they may have different positions in the hearings during the investigation.

4. Implementation of the interim decision does not prejudge the ultimate cost responsibility for the proposed transmission system upgrades which will be determined at the conclusion of the investigation in this matter.

5. All discussion, negotiation, and work product associated with the development of, and agreement to, the interim solution are governed by Rule 50 of the Commission's Rules of Practice and Procedure (Title 20 California Administrative Code Section 50).

PROPOSED ORDER

THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED AS FOLLOWS:

1. The Commission hereby issues an interim decision which allows QFs to enter into contracts which permit access to the PGandE bulk and area transmission system between the effective date of this interim order and the completion of OII 84-04-077. The conditions of this interim decision shall apply until there is a further order from the Commission.

2. The interim solution will be applicable only to QFs in the Northern Portion of PGandE's service territory which execute a Power Purchase Agreement and pay for a detailed interconnection study prior to such final decision.

3. The interim solution will not be applicable to QFs which are currently in operation or which have previously executed both

a Power Purchase Agreement *and* an interconnection or special facilities agreement with PGandE or who have been informed in writing by PGandE that there is adequate transmission capacity for their particular project. QFs of 100 kw or less which execute Standard Offer No. 3 are exempt from this order may continue to execute Standard Offer No. 3.

4. The interim solution places in effect an assessment payable by the QF to PGandE of 1.7 mills/kwh. The 1.7 mills/kwh will be payable only on kwh generated at operating levels of up to 60% capacity factor (based on rated nameplate capacity) on a monthly basis. Of this payment, 0.5 mills/kwh is non-refundable and shall be paid until the Commission's final cost allocation decision is effective. In the event the Commission's final decision is that QFs have no cost responsibility, PGandE shall refund in a lump sum without interest the remaining 1.2 mills/kwh which was paid by the QF prior to the Commission's final decision. In the event the Commission's final decision allocates some cost responsibility for upgrades to QFs, but less than 1.7 mills kwh, PGandE shall refund in the manner specified above the difference between 1.7 mills/kwh and the amount fixed by the Commission, but not less than the 0.5 mills/kwh which is not refundable. Thereafter, the QF shall pay the amount fixed by the Commission for the life of the QF project. In no event shall a QF to which the interim solution is applicable have cost responsibility exceeding 1.7 mills/kwh (up to a 60% capacity factor on a monthly basis) for the life of the project.

5. PGandE is to institute whatever operational changes are necessary to accommodate QF power, including non-economic dispatch of resources, to the extent consistent with PGandE's contractual obligations. PGandE will use its best judgment as to how to accomplish the goals of this Order as economically as possible. Any costs incurred as a result of actions PGandE performs under the terms and conditions of the Order shall be presumed just and reasonable for purposes of the reasonableness review in future ECAC proceedings as a recognition of the long term value of QF power to the ratepayer. PGandE shall keep a record of the number of QF projects to which this Order applies, when they come on line, and their hours of operations. PGandE

will report in the annual ECAC review the actions taken by PGandE to accept QF power.

6. This decision does not include the following areas: Humboldt (above 90 MW indicated in Attachment 1), Drum Division and Pit 1 (Shasta Division).

7. PGandE can recover the reasonable costs of all transmission upgrades and operating variations which PGandE undertakes pursuant to this Order.

8. The QF assessment is to be recorded as a credit entry to PGandE's Energy Cost Adjustment Account and will serve to reduce future ECAC revenue requirements.

9. PGandE shall proceed as expeditiously as possible to file an Application with the Commission to obtain a Certificate of Public Convenience and Necessity for the bulk transmission system upgrades (identified in Attachment 1) and for the Feather River 230kv System. PGandE shall also proceed with the remaining area upgrades (identified in Attachment 2) which do not require a Certificate of Public Convenience and Necessity.

10. In each northern area of PGandE's service territory, a limited number of MW of QF development shall be interconnected pursuant to this interim solution. The areas and the approximate associated MW of capacity which will result from reinforcements or additions are as follows:

Shasta Cedar Creek	31
Shasta Battle Creek	54
DeSabla Caribou	140
DeSabla Feather River	50
DeSabla Paradise	75
Colgate	30
North Bay Northern	100*
North Bay Southern	480

* 30 MW maximum can be added prior to completion of upgrades.

If QF participation in the interim solution in a given area reaches the MW level identified above for that area, additional QF projects will be subject to the final resolution of the OII. PGandE shall not be obligated to interconnect, or make commitments to interconnect such QFs until final resolution of the OII.

Drum and Pit 1 — No additional QF interconnection and power deliveries beyond existing transmission capacity are required until final resolution of the OII.

Humboldt — An additional 90 MW of QF projects can be interconnected in this area by altering PGandE local plant operations. The QFs comprising this 90 MW shall be required to participate in the interim solution. The interconnection of additional QF projects, above the 90 MW, shall not be required until final resolution of the OII.

11. Priority rights for the allocation of transmission capacity to QFs eligible under this Order will be on a first-come, first-served basis, as defined in Decision 83-10-093, Ordering Paragraph 12(c). Priority rights for each transmission allocation are not transferable between projects.

12. A QF's right to participate in the interim solution shall be contingent upon its execution of an agreement which reflects the rights and obligations of PGandE and the QF under this Order. Such agreement can, but need not, be part of the Power Purchase Agreement itself.

Respectfully submitted,

MICHAEL S. HINDUS
Attorney
Pacific Gas and Electric Company

Respectfully submitted,

DIANE I. FELLMAN
Senior Counsel
California Public Utilities Commission

Respectfully submitted,

JANICE G. HAMRIN, Ph.D.
Executive Director
Independent Energy Producers

Dated: July 3, 1984

ATTACHMENT 1

Table 1

BULK TRANSMISSION REINFORCEMENT COSTS
(In Millions of 1984 Dollars)

Transmission Reinforcement	Reinforcement to Accommodate QFs 496 MW	1,346 MW
1. Rebuild the Vaca Dixon-Contra Costa 230 kV DCTL ($5.4 M to rebuild Vaca Dixon-Peabody Jct. 230 kV DCTL)	$ 5.4	37.2
2. Rebuild the Vaca Dixon-Moraga 230 kV DCTL ($26 M to rebuild Vaca Dixon-American Canyon Junction 230 kV DCTL) (includes building a 115 kV DCTL from Cordelia Junction to Vaca Dixon)	$ 26.0	$ 55.4
3. String a second 230 kV circuit from Gold Hill to Tesla	$ 3.4	$ 3.4
4. Build an additional 230 kV DCTL from Bellota to Tesla	$ 18.2	$ 18.2
5. Add second 500/230 kV transformer bank at Tesla	$N/A	$ 15.5
6. Add 500 MVARS of shunt capacitors in the Bay Area	$N/A	$ 8.0
Total	$ 53.0	$137.7

ATTACHMENT 2

AREA SYSTEM UPGRADES

Division	Cost (In $ Million)
1) Shasta Division	
a) Cedar Creek 60 kV	2.0
b) Battle Creek 60 kV	3.0
2) DeSabla Division	
a) Caribou 60 kV	8.5
b) Feather River 230 kV system	
c) Paradise 60 kV	1.5
3) Colgate Division	
60 kV System	2.5
4) North Bay Division	
a) Northern half (Lake and Mendocino Co's.)	10.0
b) Southern half (Napa, Sonoma, Marin Co. and part of Solano Co. — Sacramento Div.)	10.0
	10.0
	$47.5

APPENDIX B

OII 84-04-077—Excerpt from transcript page 36

ALJ WU: Are you in a position, Mr. Kerler, in which you would be aware of QFs that are interested in interconnecting to the intertie?

THE WITNESS: No sir. Other than my first contact here, I am unaware of any of this outside of the area of QFs.

ALJ WU: Objection is sustained. Again I suggest this is something that PG&E and your client perhaps can agree on.

In terms of whether or not there are many other parties interested in interconnecting on the intertie, it doesn't seem to be something that should be disputed.

MR. LOZOWICKI: We can stipulate as to one, your Honor. I don't think there would be any argument about that.

ALJ WU: Okay.

MR. LOZOWICKI: Q Mr. Kerler, if PG&E wanted to take all of the purchases on the intertie that are plugged into your forecast as shown on Exhibit 3, and were also required to take additional deliveries of QF power on the intertie, would there be an available space on the intertie for both quantities of power?

A No, there would not. Based on the economics of our use of the intertie, any additional — for each additional megawatt of QF that were proposed on our line allocation would back up that megawatt of northwest economy energy.

Q In other words, you don't have — PG&E does not have enough room given the current entitlements to accommodate both what it would like to buy in the way of economy power and QF power that has been tendered by my client?

A Physically, there is a fixed amount of capacity on the intertie. And based on again the economics, we would be displacing a lower cost resource to take a QF megawatt on the intertie.

Q One way of solving that capacity problem would be to build more capacity on the intertie; wouldn't it?

A Additional line capacity would certainly open up additional ability to transmit power into the area.

However, there are times again, even with the additional line capacity, due to minimum load situations, additional capacity may be required to offset lower cost generation in our own area.

Q And part of minimum load in your own area that you are referring to is the QF supplies available in PG&E's —

A Between those periods, they can't be backed down. That is correct.

* * *

OII 84-04-077—Excerpt from transcript page 51

RECROSS-EXAMINATION

BY MR. LOZOWICKI:

Q With regard to your last answer, Mr. Kerler, about your understanding of the Commission's policies, isn't it also true that the Commission has encouraged PG&E and in fact directed PG&E to accelerate the development of small power resources?

A That's correct, in California I believe that's the case.

Q Are you saying that the Commission has distinguished between California small power sources and other sources?

A I am not aware of anything outside the area. So my understanding would be to promote it in California.

Q In other words, the only projects you are familiar with are California projects?

A That's correct.

Q With respect to the available supplies of Northwest power, would you agree that Bonneville Power Administration is in fact the largest supplier of surplus power delivered on the intertie?

A Yes, they are.

Q And would you also agree that the majority of Bonneville's power comes from hydro sources?

A That's correct, it does.

Q So although some other sources are delivered to the intertie, the majority of the power

* * *

OII 84-04-77—Excerpt from transcript page 52

delivered from the Northwest comes from hydro sources, doesn't it?

A Yes, it does.

Q Then finally you mentioned that even if the capacity on the intertie were not being completely used because of minimum load requirements, that to accept QF deliveries on the intertie would cause a further backdown on your takes on the intertie; is that correct?

A That's correct.

Q Now the minimum loads that you are referring to that cause the original backoff include the acceleration supply of QF power in California, doesn't it?

A Yes, it does.

MR. LOZOWICKI: Nothing further, your Honor.

ALJ WU: Anything further for this witness?

(No response.)

ALJ WU: Thank you very much. You are excused.

Off the record.

(Off the record.)

* * *

OII 84-04-77—Excerpt from transcript page 239

Mr. Marcus.

MR. MARCUS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. MARCUS:

Q Mr. Weatherwax, I'm Bill Marcus, and I represent the Independent Energy Producers Association.

Let me first direct the question to the Exhibit 11-D and E that you just passed out.

Is there any statement on either of these exhibits of the number of days in which the intertie was fully loaded during any of the years in question?

A There are not.

Q Let me turn real briefly to page 15 of your prepared testimony.

And I have got a couple of questions on that.

The first goes to your sentence beginning at lines 12 to 14 on page 15.

Does this sentence imply that the Hydropool projects would have had deleterious environmental impacts had they been located in California.?

A I do not believe that it necessarily does.

This certainly says there will be no deleterious environmental impacts within California from there being located in Oregon.

Q So essentially if there are any environmental impacts, we have exported them to the Northwest? In that a fair characterization?

* * *

OII 84-04-077—Excerpt from transcript page 258

Q [Mr. Marcus] On page 7 of your testimony — excuse me. Wrong page.

On page 10 of your testimony at line 20, you speak of this level of average usage, given average weather conditions, there are on average between 200 and 700 megawatts of capacity available.

Is that what your testimony says now that we have gone through the corrections?

A Yes.

Q Does this sentence contain any information on differences in seasonal loadings of the line?

A No.

Q At page 13, lines 6 through 8, does that sentence state that Hydropool during average-to-wet years in the spring runoff result in backdowns of economy energy on the intertie?

A I believe the line states relatively clearly, the three lines, the sentence, that it is likely that during average conditions, there will be times during those spring runoff periods that that would occur.

Q And will there be times within the subset of the spring runoff period where Hydropool power would cause backdown in the intertie — let me back down and ask the question a little more straightforward.

When some of these backdowns that you have identified occur, will there be times when a QF delivering power elsewhere into the PG&E system than

* * *

OII 84-04-077—Excerpt from transcript page 259

on the intertie would not cause the same backdowns?

A [Dr. Weatherwax] The backdowns that I referrred to would occur during the spring flood, based on load imbalance in the northwest and would occur both at times of minimum loads and at other times.

At times of minimum load, the equivalent impact between QFs in California or on the intertie would be identical during certain peak times.

There could be additional backoffs on the intertie from a QF that was connected to it.

Q [Mr. Marcus] So to bring this down to a concrete example, suppose it is 3:00 o'clock in the afternoon and it is a warm day and people are starting to turn the air conditioner on in the month of June, and the intertie is fully loaded.

Taken that general concrete hypothetical, in such a case, would it be likely that PG&E's main system would be marginal on oil and gas, but the Hydropool project could cause backdown on economy energy?

A Would you repeat the question.

Q During a peak on an early summer afternoon — I think it is a compound question. I will break it down.

During a peak summer afternoon, is it likely that PG&E's system marginal fuel would be oil or gas?

A Yes.

* * *

OII 84-04-077—Excerpt from transcript page 292

A [Dr. Weatherwax] I have not done any that is current at this point.

Q [Ms. Cohn] At page 5 of your testimony at lines 27 and 28, you refer to the MOU.

Did the Secretary of Energy approve the MOU as submitted?

A Well, he approved it with a couple of modifications, including the retention of ownership by Western and the allocation of additional 50 megawatt right to certain agricultural interests, I believe, in the San Joaquin Valley.

Q Do you know if the participants have accepted the modifications proposed by the Secretary of Energy?

A I know there are numerous committees ongoing, and I guess there is a very current management meeting of the partici-

pants over which these points are being discussed, presumably, as well as other points.

Q Does that mean that they have not been accepted?

A Well, to the best of my knowledge, they have not, but I would not expect them to be an overwhelming hurdle.

Q Are you relying on that petition of the MOU

* * *

OII 84-04-077—Excerpt from transcript page 350

A [Mr. Malinowski] Well, we currently have an experimental rating for the intertie of 2800 megawatts. The capacitor upgrades that are taking place should provide us the capability to increase the intertie capability to 3200.

Q [Mrs. Fellman] Are you aware of any QFs that currently deliver over the intertie?

A No.

Q In discussions with Ms. Cohn from Edison you stated, or you talked about how the cap would be determined — or perhaps it was Mr. Kerner, I'm sorry.

Are there other criteria that would be used in determining whether or not a QF should be responsible for the cost of building an upgrade besides this cap?

A I think one of the factors is the issue of what are dedicated facilities and nondedicated facilities.

Q In your development of determining whether a facility was dedicated or not, what would be some of the criteria that you would look at in making that decision?

A There we would have to establish where that QF would have to tie to your system in order to get outlet power capability.

It would not always be the nearest substation.

* * *

OII 84-04-077—Excerpt from transcript page 389

A [Mr. Malinowski] Yes, we do need to have that information.

Q [Mr. Hindus] Now, turning to your testimony on page 6, the last paragraph, Mr. Lozowicki asked you a number of questions about your sentence,

> "The 500 kv lines carry some surplus generation and transfer it to the 230 kv system."

Does this mean that there is surplus transmission capacity?

A No.

Q Finally, also in response to questions by Mr. Lozowicki, you indicated that taking 1150 megawatts of QF power could require PG&E to turn back Northwest power.

Do you remember that line of cross-examination?

A Yes.

Q Would you testify that one of the reasons for completing those upgrades is to avoid having to turn back Northwest economy power?

A Yes.

MR. HINDUS: I have no further questions on redirect.

ALJ WU: Is there any recross? Mr. Lozowicki.

MR. LOZOWICKI: Thank you, your Honor.

* * *

OII 84-04-077—Excerpt from transcript page 390

RECROSS-EXAMINATION

BY MR. LOZOWICKI:

Q Mr. Malinowski, regarding the last question counsel asked you, specifically that the reason for the upgrades authorized by the interim stipulation was to avoid the back-off of takes from the Northwest, I take it then that until those upgrades are completed, that one effect of the additional QF generation authorized by the

interim stipulation will be the effect on PG&E's takes of Northwest power.

A We will have to make choices between backing off Northwest and backing off our own generation.

The intent would be that we would do the backdowns in the most economic way.

Q So you have studied those two alternatives?

A We have done some analysis to determine what we'll have to do, yes.

Q In your prepared testimony you mention, at Attachment 8-4, page 1 of 3, in the last paragraph, first sentence,

"With 80 megawatts of PP&L import,"

and there's a certain description about the Battle Creek area, and also on the power flow charts, Attachments 2 through 6, you list in the legend in the left-hand corner PP&L import 80 megawatts.

What does that 80 megawatts refer to?

MR. HINDUS: Objection, your Honor. I don't

* * *

OII 84-04-077—Excerpt from transcript page 391

recall cross-examination even remotely close to this area. This is recross on redirect.

ALJ WU: I agree, Mr. Hindus, but this is an investigation and I'll allow Mr. Lozowicki to ask this question.

MR. HINDUS: Okay.

ALJ WU: Please answer it.

MR. LOZOWICKI: Thank you.

THE WITNESS: Your question is in reference to the 80 megawatts of PP&L imports?

MR. LOZOWICKI: Q Yes.

A We have made provisions to be able to import on our 115 tie to PP&L power in addition to the imports that we might get from the Northwest on the 500.

Q So there's another line that runs in PP&L's territory?

A Yes.

Q And what is the generation source for the imports from PP&L?

A I don't know the specific plants, but they have a number of hydro plants in Northern California and southern Oregon that might contribute to that flow.

Q And that is something, those imports are something that are in your current resource plan?

A They're economy imports, so they would not be included in the resource plan.

* * *

OII 84-04-077—Excerpt from transcript page 392

There's no capacity associated with them.

Q But they are imports that you consider in preparing the power flows for purposes of describing the constraints on the system?

A As far as that particular area is concerned.

MR. LOZOWICKI: Thank you. Nothing further, your Honor.

ALJ WU: Ms. Fellman.

MS. FELLMAN: Thank you, your Honor.

RECROSS-EXAMINATION

BY MS. FELLMAN:

Q Mr. Malinowski, with regard to PG&E actually applying the cap, is it your position that the Commission would have to approve the cap before PG&E would use it?

A Yes, I think we have to be assured that we won't have disallowances if we go forward with such contracts.

Q Do you believe there's an adequate showing in your testimony today for the Commission to adopt your recommended $300 per kilowatt cost cap on construction?

A Yes, I do.

Q Could you please then explain why you would seek Commission advice in determining what the divisor should be of that cost cap that you just mentioned to your counsel?

* * *

OII 84-04-077—Excerpt from transcript page 611

Q [Mr. Hindus] Did PG&E notify you that you didn't need to tender these contracts at all?

A [Mr. Gold] At that time we had a notification from PG&E that nothing had to be done.

We were afraid, however, that other items were taking place, other proceedings, that would affect this if we didn't get a record as having applied for standard offer contracts at that time.

Q So, in fact, you understood these might not be the final documents; you just wanted to make sure you could say you had tendered them.

Is that reasonable?

A We were final as far as we were concerned, unless PG&E didn't want to seek peak and partial peak power in the manner in which we were proposing to deliver it.

Q Let's just review, then, for all the hydro projects in order for the firm capacity payments to be made pursuant to a standard offer.

The power would have to be supplemented either by other Hydropool projects or by firming or shaping power; is that correct?

A Yes.

* * *

OII 84-04-077 Excerpt from transcript page 820

MR. AJELLO: Q At this meeting which you described, didn't you agree that the intertie would not be included in deliveries of out-of-service-area projects?

A [Mr. Gold] I don't think so.

It wasn't my intention to do that.

My only recollection of that settlement meeting which is — that is the brightest recollection I have of that settlement meeting was that it was a total disaster, that nobody agreed to anything, and I have never come up against such hostility as occurred at the meeting.

I basically left that meeting thoroughly depressed, and that we had made no progress whatsoever in our discussions.

And had I gone away from that meeting thinking I had agreed to something, it would have been a difference remembrance because that meeting was one in which we just got nowhere.

Q Did representatives of PG&E state that they would take your power if it was delivered to their service area by means other than the intertie?

A That's a — there are no connections between our projects and — other than the intertie and PG&E's other system, so to some degree we talked about the hypothetical of building your own lines, too, our

* * *

OII 84-04-077—Excerpt from page 821

building our own lines from the system, and based on that I'd have no objection.

I got to qualify that. They said unless they — so long as they were never — they were never connected to the integral — to the integrated transmission system. So that this — this was a point that I asked about: if those lines were interconnected in any way

— if we built a transmission line from our project to another — to one of the PG&E service territories, or northern service areas, for example, if the representative from PG&E said if that was connected in any way to the northwest integrated system, that that would be totally unacceptable, that it had to be a line which did not interconnect on the other side of the project to the integrated system because that would have made — that would have, in effect, as far as he was concerned, turned a radial line into a line connected to the whole loop line.

So if you could do something which again was impossible, build it — you know, isolate the QF from the rest of the northwest system even though it's located in the northwest, building their own line dedicated solely to the QF — from the QF down into one of the northern service territories enumerated in the proposed stipulation, that would be fine as far as he was concerned.

He was willing to make that concession.

* * *

OII 84-04-077—Excerpt from transcript page 857

ALJ WU: All right. Recross, Mr. Hindus?

MR. HINDUS: Thank you, your Honor.

RECROSS EXAMINATION

BY MR. HINDUS:

Q Good morning, Mr. Gold.

You were asked about a meeting on or about July 25th, 1984, in which you were present?

A Yes.

Q And you indicated in response to a question by Mr. Ajello that PG&E agreed that we could take your power peak and deliver to an area line; is that correct?

A If I could deliver it to an area line under very special circumstances.

Q And those circumstances were that it had to be a direct radial connection; is that correct?

A I think that's correct.

Q And PG&E specifically stated that they did not want to open up another connection with another utility?

A That's right.

Q Is it your recollection that the transmission planners who were at that meeting told you the reason they didn't want another interconnection was for stability reasons?

* * *

OII 84-04-077—Excerpt from transcript page 858.

A Yes.

APPENDIX C

Application No. 82-04-44
Application No. 82-04-46
Applica. ı No. 82-04-47

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE
STATE OF CALIFORNIA

Second Application of Pacific Gas and Electric Company for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2

And Related Applications

PETITION FOR MODIFICATION BY COGENERATION SERVICES, INC. AND HYDROPOOL OF DECISION 85-04-075

PETTIT & MARTIN
EDWARD B. LOZOWICKI
JACK T. HOLLAND
333 West Santa Clara Street
Tenth Floor
San Jose, California 95113

May 22, 1985

Attorneys for Cogeneration Services, Inc. and Hydropool, Interested Parties

Application No. 82-04-44
Application No. 82-04-46
Application No. 82-04-47

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE
STATE OF CALIFORNIA

Second Application of Pacific Gas and Electric Company for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2

And Related Applications

PETITION FOR MODIFICATION BY COGENERATION SERVICES, INC. OF DECISION 85-04-075

I. INTRODUCTION

COGENERATION SERVICES, INC., ("COGEN") is a developer of alternative energy sources. It develops and markets small hydropower and cogeneration projects in California, and other states. COGEN is also a general partner of Hydropool, a partnership which develops similar projects, both in the Northwest and in California. (Both parties hereafter "COGEN"). COGEN appeared as Interested Parties in this case at the November 5 *en banc* hearing and argued against the Staff motion for various modification to Interim Standard Offer 4. RT.1428:7-8. COGEN subsequently filed an opposition memorandum both to the Staff motion and a related motion made orally by PG&E at the *en banc* hearing; and concurrently requested a continuance of the hearings on those motions. COGEN has also participated in workshops held by the Public Staff to discuss the issues in this case.

In addition COGEN has participated as an Interested Party in the "transmission constraints" case, OII 84-04-77. A major issue in that case has been the applicability of the Commission's "Interim Solution Order" to QRs located outside PG&E's service area. See D.84-08-037. Shortly after its issuance, PG&E petitioned to modify the "Interim Solution" so as to exclude fourteen

of COGEN's Northwest QF projects which planned to interconnect on the Pacific Northwest Intertie. In response to that Petition, the Commission first ordered limited rehearings in D.84-11-123; and later ordered consolidation of the Intertie issue with the bulk transmission hearings. See D.85-01-039. Since then, the parties have presented several witnesses and documentary evidence in the course of several hearings. A motion to dismiss is now pending before the Commission.

After the Interim Solution was adopted, COGEN requested interconnection with PG&E and the preparation of standard contracts for the fourteen projects. See Exhibits 1 and 2 attached. Because of the pending Petition for Modification, PG&E refused to process the contracts in the ordinary course. See Exhibit 3 attached. Rather, hearings were set on the Petition. During this time COGEN tendered contracts for each project and proposed execution conditioned upon the outcome of the hearings. See Exhibit 4 attached. PG&E, however, would not accept this proposal.

The Commission's suspension order, D.85-04-075, on its face, would preclude execution of contracts with the fourteen Northwest QFs, even if the Petition for Modification in the constraints case is denied. However, COGEN believes that the fourteen Northwest contracts were not intended to be affected by the Commission's suspension order herein. Rather, because of the unique circumstances, the Northwest QF projects have been suspended pending the outcome of hearings on the Intertie issue and PG&E's Petition for Modification. This "limbo" status existed for eight months prior to the April 17 suspension order. Therefore, the availability of Interim Standard Offer 4 for these projects should rest upon a decision in the Constraints case.

At the Workshop of May 3, 1985 Commission Staff indicated that QFs who were affected by the suspension order should request relief by means of a Petition for Modification. Therefore, the purpose of this Petition is to seek clarification from the Commission that the Decision 85-04-075 would not apply to the fourteen QFs; and that interim Standard Offer 4 may be available to them upon a decision in the Case No. I-84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

II. FACTUAL BACKGROUND

In August, 1984, the Commission issued Decision No. 84-08-037 which approved the Interim Solution for QFs in PG&E's northern area. In that order, the Commission modified a prior stipulation by certain parties to provide that the benefits of the order would extend to all QFs affected by transmission constraints, whether within or without PG&E's Northern service area. *Id.* at page 10, OP No. 1a; FF No.'s 7 and 8. This modification was made upon the motion of several QFs at a prior prehearing conference, including COGEN. *Id.* at page 5. PG&E subsequently petitioned to modify the order so as to exclude QFs interconnecting to the Intertie north of Round Mountain Substation. The only QFs affected by such petition are the fourteen Northwest projects proposed by Hydropool.

Before decision on this Petition, Hydropool requested interconnection and the preparation of contracts for its fourteen Northwest projects. See Exhibits 1 and 2 attached. PG&E refused to process this request, contending that it did not believe the Interim Solution applied to QFs on the Intertie. See Exhibit 3 attached. Thereafter, out of concern with the regulatory lag, Hydropool tendered seven contracts in PG&E's Standard Offer 4 form conditioned upon the outcome of the Petition for Modification. See Exhibit 4, para. 4. PG&E refused to sign any contracts for similar reasons. As described above, the Commission subsequently ordered limited rehearings on the Intertie issue; and later consolidated them with the first phase hearings on bulk constraints. See D.84-11-123 and D.85-01-039. The remaining seven contracts were subsequently submitted and refused.

III. GROUNDS FOR RELIEF

As stated in PG&E's Petition for Modification of D.85-04-075, most of the "orphan contracts" remained unsigned on April 17 because of the "gold rush" of contracts submitted in the last few weeks prior thereto. See PG&E's Petition for Modification 2:14-23 (5/15/85). In effect, PG&E contends that it could not execute all these contracts in due course because of the heavy volume of contracts tendered. *Id.*

Unlike these QFs, PG&E never *began* to process the contracts tendered by Hydropool. In fact, it was necessary for Hydropool to fill out a contract form and tender it to PG&E because of the Utility's unwillingness to prepare formal contract documents, as is customary. Its express reason for doing so was the pendency of rehearings on the Petition for Modification; and its belief that it was not obligated to purchase from QFs delivering on the Intertie. See Exhibit 3. PG&E recognized the unique circumstances: "Because PG&E views Hydropool's position, vis-a'-vis the interim solution, as unique, this reservation of participation is not contingent upon any further action by Hydropool at this time." Exhibit 3, para. 2.

Thus, the reasons for non-execution of these fourteen contracts are very different from those other QFs which could not obtain mutually signed contracts because of the "gold rush." For this reason, and because the lack of execution is due to hearings pending before the Commission, Hydropool does not believe that the Commission intended to include the Northwest projects in its order suspending Standard Offer 4.

Furthermore, to so hold would be grossly inequitable under these circumstances. Hydropool first requested interconnection and Standard Offer 4 contracts on August 7, 1984. The Commission did not suspend Standard Offer 4 until April 17, some eight months later. The sole reason for PG&E's failure to execute these contracts was its pending Petition for Modification, and the ensuing hearings on the Intertie issue. But for the pendency of these hearings it is clear that the Northwest projects would have moved forward and contracts been signed in due course. Utilities have a mandatory duty to sign Standard Offers in Commission-approved form, unless the QF requests negotiated terms. D.84-08-031, p.61, Op#3. Thus, it is only the regulatory lag time which has placed these fourteen QFs under the suspension order.

If the Commission denies the Petition for Modification (as it should) and allows the Northwest projects to proceed under the Interim Solution it would be grossly inequitable to deny to them the form of contract which was available and would have been executed but for the Petition for Modification. Otherwise, such a

result would penalize a QF after it had relied on a Commission order and because a utility chose to fight the issue.

IV. CONCLUSION

For the reasons stated herein, COGEN respectfully requests that the Commission modify D.85-04-075 to provide that the suspension of Standard Offer 4 does not apply to the fourteen Hydropool projects totaling 66.2 megawatts; and that interim Standard Offer 4 may be available to them upon a decision in Case No. I.84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

Dated: May 22, 1985. Respectfully submitted,

PETTIT & MARTIN

By: /s/

Edward B. Lozowicki
Attorneys for Cogeneration Services, Inc. and Hydropool, Interested Parties

APPENDIX D

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

* * *

OII No. 85-11-008

Investigation on the Commission's own motion into the desirability of power purchases from cogenerators and small power producers located outside of the purchaser's service area or outside of California and the terms and conditions which should be applied to such purchases.

ORDER INSTITUTING INVESTIGATION

[Filed Nov. 6, 1985]

By this order, the Commission begins an investigation of electric capacity and energy purchases by Pacific Gas and Electric (PG&E), Southern California Edision (SCE), and San Diego Gas and Electric (SDG&E), from cogenerators and small power producers, otherwise known as qualifying facilities (QFs), located either outside the utilities' service areas or outside of California.

QFs located in the Pacific Northwest, the Southwest, and California's Imperial Valley want to wheel power to California utilities and take advantage of higher avoided cost rates than are offered by utilities in their regions. However, the actual avoided costs paid to out-of-service area and out-of-state QFs may differ from the avoided costs paid to other California QFs. If QFs wheel power over interties, their power might displace economy energy purchases which would cause economic harm for California's ratepayers. Maintaining ratepayer indifferences, as a result of accurate avoided cost, may require additional curtailment provisions or a different pricing structure than is available to in-service area QFs.

As part of I.84-04-077, the Commission adopted D.84-08-037 which authorized an interim solution to allow QFs to continue development in the northern part of PG&E's service area during

completion of transmission capacity upgrades and additional new lines.

Cogeneration Services, Inc. (Hydropool) sought to wheel power from projects in the Pacific Northwest to PG&E over the Pacific Intertie under the terms of the interim solution. In D.85-09-058, the Commission decided that the Pacific Intertie should be excluded from the interim solution but that the issue of purchases from out-of-state QFs deserved further study. Ordering paragraph No. 4 states:

> "4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place."

Since many of the issues that apply to out-of-state QFs, such as the use of interties, also apply to QFs in the Imperial Valley and other remote areas of California, the scope of this investigation is expanded to include QFs located in the state but outside the purchasing utilities' service area. For these reasons, we are making the major electric corporations respondents to this general investigation.

Therefore, good cause appearing,

IT IS ORDERED that an investigation on the Commission's own motion is hereby instituted into the desirability of purchasing power from QFs located outside the service area of the purchasing utility or outside the state for the purpose of determining:

1. the extent to which unlimited power purchases resulting from interconnection of out-of-service area QFs would cause displacement of economy energy from the Northwest and Southwest;

2. the feasibility of developing pricing and curtailment options to assure that the true costs avoided by QFs are measured, including the forgone opportunity of the use of transmission lines for other sources;

3. additional contract terms needed to allow purchasing utilities to track the progress of out-of-service area QFs for resource planning purposes;

4. an evaluation of the circumstances, if any, under which it would be appropriate to make standard offers available to out-of-service area QFs and the form of such offers; and

5. the potential discriminatory and anti-competitive effects of accepting or not accepting out-of-state QFs with the possibility for economic harm or no economic harm to the California ratepayers; and

6. additional contract terms and conditions and other factors which would negate or ameliorate against any potential economic harm to the California ratepayer.

IT IS FURTHER ORDERED that each electrical corporation named and interested parties shall file with the Commission's Docket Office by November 25, 1985 an original and 12 copies of a statement addressing each of the above issues and listing additional issues that should be included in the investigation. A prehearing conference will be scheduled to set forth the issues and schedule for this proceeding.

The Executive Director is directed to mail a certified copy of this order to the respondents and to cause a copy of this order to be mailed to all appearances in A.82-04-044 *et seq* and I.84-04-077.

Dated November 6, 1985, at San Francisco, California.

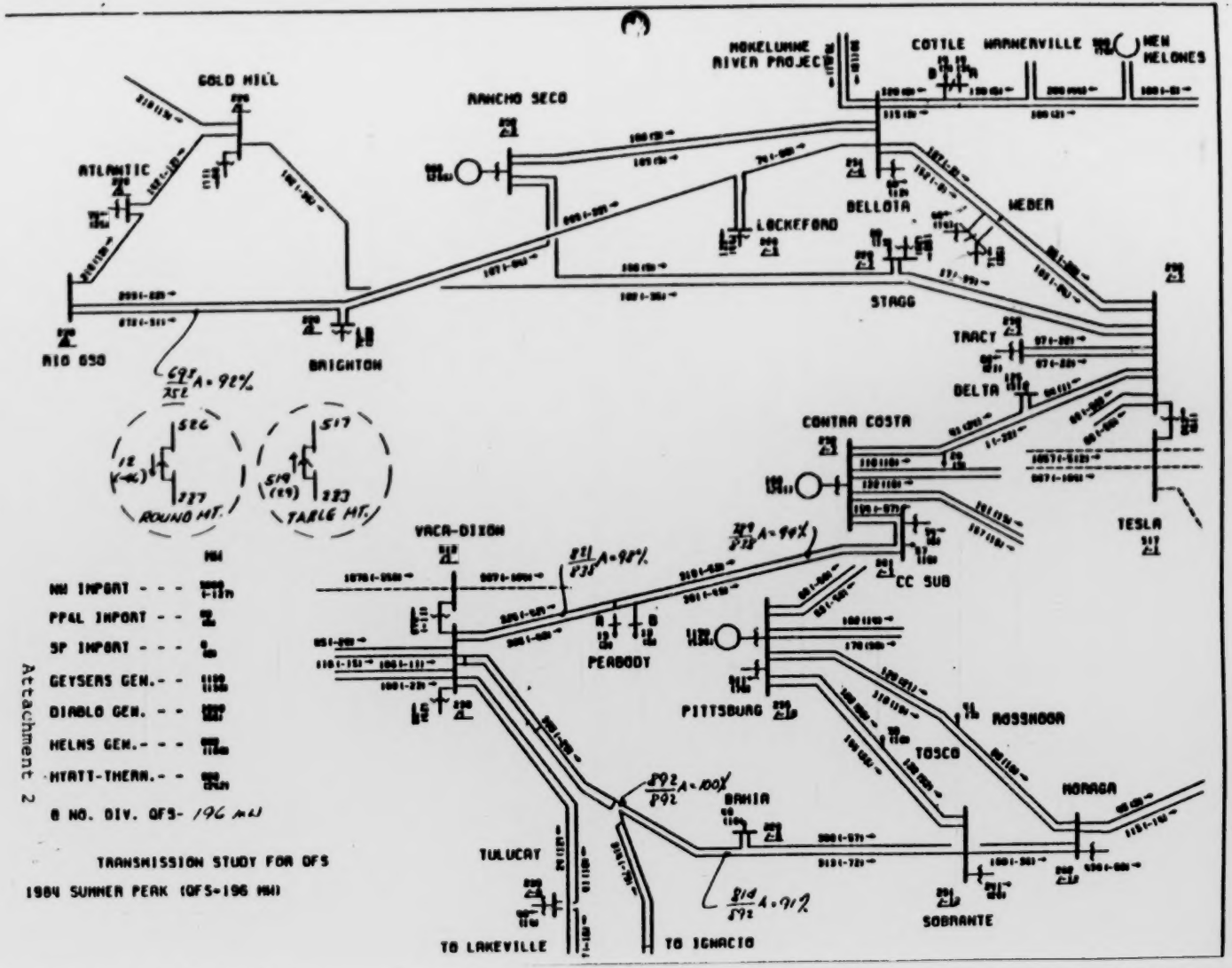
DONALD VIAL
President
VICTOR CALVO
PRISCILLA C. GREW
WILLIAM T. BAGLEY
FREDERICK R. DUDA
Commissioners

APPENDIX E

OII 84-04-077
April 8, 1985
Exhibit 20

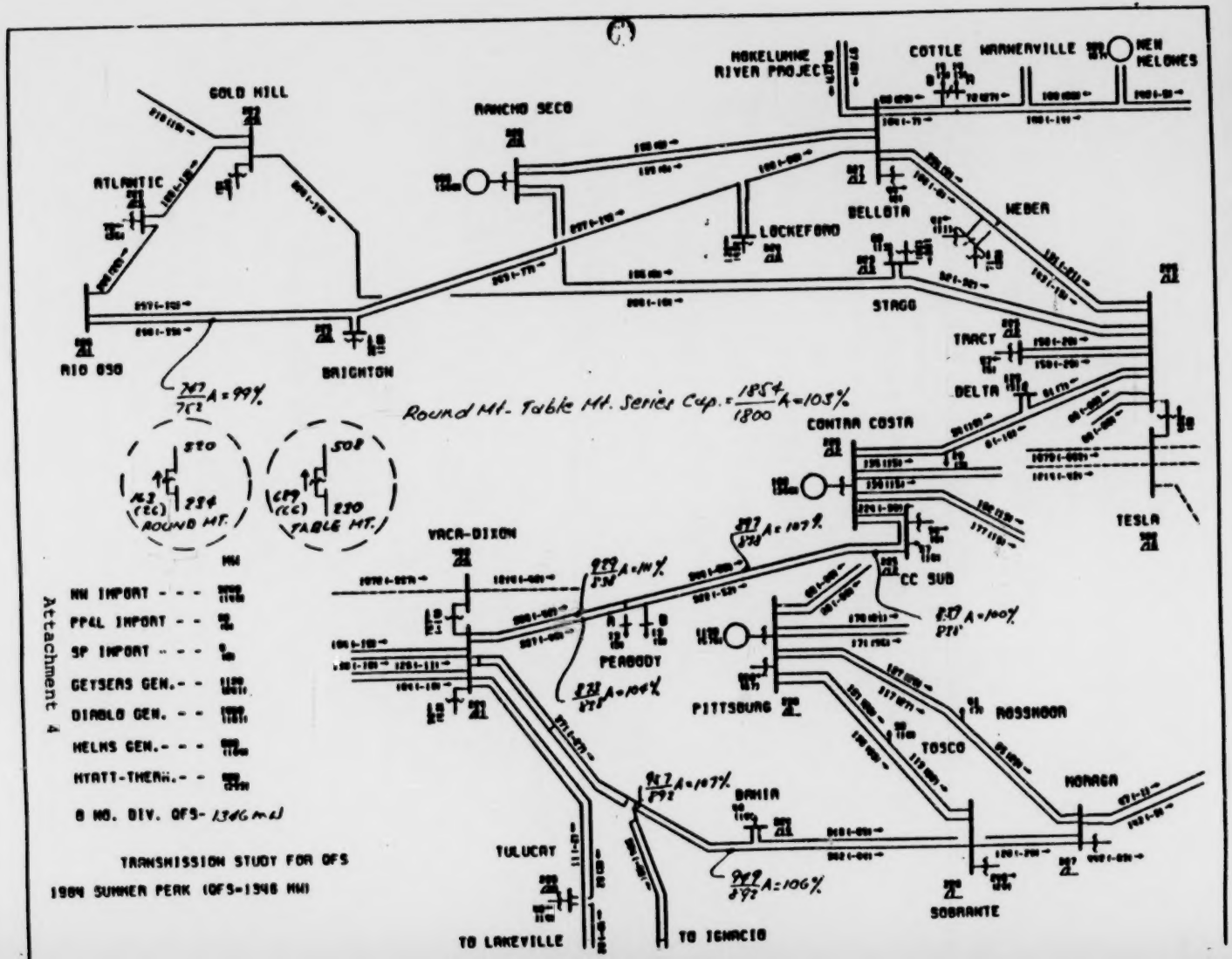
PACIFIC GAS AND ELECTRIC COMPANY

EXCERPT FROM
PREPARED TESTIMONY OF
JAMES H. MALINOWSKI



Attachment 2

BEST AVA



Attachment 4

AILABLE COPY

EXHIBIT NO. 13

APPENDIX F

OII 84-04-077

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.

EXCERPT FROM

EXHIBITS SPONSORED BY

IVAN LEWIS GOLD

PETTIT & MARTIN
EDWARD B. LOZOWICKI
JACK T. HOLLAND
Pacific Valley Building
333 West Santa Clara Street
San Jose, California 95113

Attorneys for Cogeneration Services, Inc. and Hydropool, Interested Parties

(LETTERHEAD)

San Francisco
November 16, 1984

BY HAND DELIVERY

Thomas Jefferson
Pacific Gas and Electric Co.
77 Beale Street
Room No. 2312
San Francisco, CA 94106

RE: Hydropool Projects

Dear Mr. Jefferson:

This will follow up on our letter to Pacific Gas and Electric Company of September 25, 1984, and PGandE's letter to Hydropool of September 25, 1984, regarding the above. Hydropool is concerned that it does not yet have power purchase agreements or interconnection questionnaires from PGandE for its projects. Recent events in the PUC suggest that any further delay in obtaining signed agreements may seriously prejudice our ability to move forward with the projects.

Accordingly, we are tendering herewith signed power purchase agreements for seven of the projects previously discussed. We will provide standard offers for the balance of our projects in the immediate future. We have selected the "firm capacity" payment option for the six (6) hydroelectric projects and one (1) cogeneration project. As we discussed, we will provide PGandE supporting information to justify the firm capacity election. In the event the information as finally prepared is inadequate or would support a firm capacity rating too low for our purposes, you have agreed we can elect as-delivered forecast capacity prices. In any event, our filing today is intended to place us on record as subscribing for

PGandE Standard Offer Number 4, energy payment option 2, and firm capacity or as-delivered capacity option 2 (as the case may ultimately be), at the price levels in effect today.

Please forward to us interconnection questionnaires and an estimate of the cost of an interconnection study for these projects. Because the point of interconnection for all the projects will be Malin, we believe only one interconnection study will be necessary. On that assumption, we attach a check for sixteen thousand dollars ($16,000) as a "flat rate" payment for such a study. We will complete and return the questionnaire upon receipt from you.

As previously mentioned, we are willing to make the power purchase agreements final, subject to a decision from the PUC regarding PGandE's petition for modification of Decision #84-08-037. In this regard, you have agreed not to negotiate our check without advising us.

Please sign the attached Receipt of Service and return it to Hydropool. We understand you will return typewritten versions of the attached Standard Offers for our signature. Your cooperation in these matters is greatly appreciated.

Very truly yours,

/s/

Ivan L. Gold

ILG:ba
Enclosures

APPENDIX G

Excerpt from:
Decision 83-10-093, October 19, 1983
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application 82-03-26
(Filed March 8, 1982)

Application of PACIFIC GAS AND ELECTRIC COMPANY for Approval of Certain Standard Offers Pursuant to Decision 82-01-103 in Order Instituting Rulemaking No. 2.

Application 82.03.37
(Filed March 8, 1982)

SOUTHERN CALIFORNIA EDISON COMPANY, application for 3 standard offers for purchase of electric power from cogeneration and small power production facilities.

Application 82-03-62
(Filed March 16, 1982)

Application of SIERRA PACIFIC POWER COMPANY, for approval of its standard offer to purchase cogeneration and small power production facilities.

Application 82-03-67
(Filed March 18, 1982)

Application of PACIFIC POWER & LIGHT COMPANY for Approval of Certain Standard Offers Pursuant to Decision 82-01-103 in Order Instituting Rulemaking No. 2.

Application 82-03-78
(Filed March 22, 1982)

In the Matter of the Application of SAN DIEGO GAS & ELECTRIC COMPANY for an Order by the California Public Utilities Commission Directing SDG&E to Purchase Power From Qualifying Facilities Based on Standard Offers and to Make Certain Changes or Additions to its Tariffs Affecting Purchases from Qualifying Facilities.

Application 82-04-21
(Filed April 8, 1982)

Application of CP NATIONAL CORPORATION for approval of certain standard offers pursuant to Decision 82-01-103 in Order Instituting Rulemaking No. 2.

OIR 2
(Petition for Modification
Filed September 10, 1982)

Rulemaking on the Commission's own motion to establish standards governing the prices, terms, and conditions of electric utility purchases of electric power from congeneration and small power production facilities.

(See Decision 82-12-120 for appearances.)
Additional Appearances

George M. Galloway, Attorney at Law, (Oregon), for Pacific Power & Light Company, applicant.

Matthew V. Brady, Attorney at Law, for Arcata Lumber Company; *Arthur C. Fegan,* for CP National Corporation; and *Nicholas R. Tibbetts,* for Congressman Douglas H. Bosco, First Congressional District-California; interested parties.

Page No. 75

B. Varying the Standard Offer

Another issue involving the language of the standard offers in general is the impact of making only minor changes in the terms. Several of the parties to this proceeding have urged that a contract containing terms which deviate slightly from the approved standard offer should be treated the same as a standard offer. For the utilities, this result would mean the assured recovery of costs related to such a contract, which would be considered reasonable per se. For QFs, it would mean the ability to particularize an agreement without any need for Commission approval or the alteration of other contract terms.

One approach recommended by CMA is for the Commission to identify certain terms of the standard offers which would be negotiable. For these terms, the Commission could define a range

of reasonableness and, as long as the parties' negotiations fell within this range, the resulting contract would be considered a standard offer.

PG&E, who also seeks this Commission's clarification of the boundary between standard and nonstandard offers, suggests that the utility should be able to alter nonprice provisions of the standard offer without jeopardizing the offer's status. Nonstandard contracts, in PG&E's view, would include contracts which provide levelized or fixed energy prices, floor prices, or debt guarantees. PG&E also seeks explicit Commission authorization for utilities to extend pricing provisions and associated conditions of approved nonstandard contracts to other QFs without the risk of nonrecovery of utility costs.

In its brief, the staff responded to these various suggestions based on its understanding of this Commission's findings in D.82-01-103:

> "First, the Commission stated that negotiated contracts should be 'the economic equivalent of the standard offer.' (p. 91.) Many terms in the standard offer can be altered slightly, or in some cases substantially, without affecting the economic balance contemplated in the standard offer. Staff believes that utilities should not hesitate to make such alterations in their offers to specific QFs if such alterations further the goal of increasing alternative energy production. When the economic balance of the standard offer is altered by a changed term, the statement of the Commission suggests that a compensating adjustment is required to reinstate the economic balance of the standard offer. It should be recognized, however, that the economic balance contemplated in the standard offer is not so fragile that it will not withstand minor adjustment. Staff believes that utilities should make such minor adjustments when appropriate. As the Commission stated, once the Commission has reviewed a contract, including the standard offers involved in this proceeding, for consistency with avoided cost principles, utilities should be expected to sign similar contracts without Commission review, even if such contracts are nonstandard in the narrow legal sense. (p. 104.)" (Staff's Brief, p. 110.)

The staff has correctly summarized this Commission's view of variations from the standard offer. One of the reasons for describing several different standard offers in D.82-01-103 was to illustrate to the utility and QFs the package of terms and conditions which we would find reasonable and under which the recovery of utility costs would be assured. We did not claim, however, that the offers so described would necessarily define all of the reasonable combinations of terms and conditions which could govern a QF power purchase.

Not only do we acknowledge the difficulty of identifying all reasonable permutations of the standard offer, but we also find impossible our providing initial review and approval of all of the contracts whose terms may vary from the standard offer. The utilities nevertheless ask us to guarantee their recovery of all costs associated with these contracts. Our obligation to safeguard the interests of the ratepayers leads us to deny this request. To some extent, a utility's concern that its costs may be disallowed provides the utility with an incentive to consider the interests of its ratepayers in its negotiations with QFs. Further, the risks of nonrecovery become proportionately less when the variations from the standard offer are only slight.

We do not wish, however, for a utility's concern over the nonrecovery of costs to paralyze its activities with QFs. We believe that we have already taken steps in D.82-01-103 to allay the concerns of both the utilities and the QFs. First, we have allowed the utilities to bring nonstandard contracts before us for our review Second, we have obligated the utilities to negotiate with QFs in good faith.

This approach appears to have worked well so far. The utilities have been negotiating vigorously and successfully with QFs. We have now received and approved several forms of standard offers, as well as a number of nonstandard contracts. The totality of our actions should provide the utilities with a fairly clear picture of what agreements we would consider reasonable. Under these circumstances, it is unnecessary for us either to make portions of the standard offers negotiable or to extend standard offer status to those contracts whose terms vary from those of the standard offer.

Additionally, PG&E's request that utilities should be authorized to alter nonprice provisions without jeopardizing the standard offer status creates an artificial distinction between price and other terms of the contract. Changes in nonprice terms can have very real economic effects on ratepayers and the parties to the contract. As we stated in our earlier decision, we are concerned that the economic balance represented by the standard offer should be maintained in negotiated contracts. That economic balance is not limited to the exchange of dollars between the parties.

Finally, we note that the current form of the standard offer may in fact change in the future. We hope and expect that experience in this developing industry will lead to refinements, improvements, and perhaps elaborations of the standard offers. We believe that the process of negotiation between QFs and utilities will provide us with some important information on changes to the standard offers. Because we do intend to limit standard offer status, but also recognize the legitimacy of the utilities' concerns, we will continue to allow utilities to bring nonstandard contracts to us for our review under the same circumstances which currently govern that review.

APPENDIX H

I.84-04-077
(Filed April 18, 1984)

Decision 85-09-058, September 18, 1985 As Modified by Decision 86-02-033, February 5, 1986

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on congeneration and small power production development.

(See Decisions 84-08-037 and 85-01-038 for prior appearances.)

Additional Appearances

Ann P. Cohn, David N. Barry, III, and Jennifer Moran, Attorneys at Law, for Southern California Edison Company, respondent. Graham & James, by *James Squeri,* Attorney at Law, for Union Oil Company of California; *Neal A. Johnson,* for California Waste Management Board; *Robert Logan,* for himself; *Alicia Torre* for International Power Technology; and *Margaret Rueger,* for U. S. Windpower, Inc.; interested parties.

OPINION

I. Summary

By this order, we close an investigation into transmission limitations in utility systems which may affect the development of Qualifying Facilities (QF). We find that Pacific Gas and Electric Company (PG&E) may have significant constraints in its northern system. The other two utilities, Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E), should not have significant transmission constraints.

II. Background

On April 18, 1984, the Commission issued Order Instituting Investigation (I.) 84-04-077 to examine alleged transmission constraints in PG&E's transmission system which would affect QF development. The Commission also wanted to assess the extent of any limitations in other utilities' transmission systems which would affect QF development.

The respondent utilities filed statements of anticipated limitations on their bulk and area transmission systems over the next ten years which may affect QF development. In these statements, only PG&E predicted that it would have significant constraints in its northern transmission system.

After submission of the utilities' statements, the Public Staff Division (staff) held several workshops at which an interim solution was developed for PG&E's northern transmission system, a milestone procedure for QF development was formulated, and transmission cost allocation approaches were discussed. (See Decision (D.) 84-08-037 and D.85-01-038.) The participants in the staff's workshops were able to resolve several issues and thereby reduce the need for formal hearings.

Hearings were held from April 8-12, 1985 on three subjects: utilities' transmission constraints, cost allocation approaches, and access to the Pacific Northwest-Pacific Southwest 500 kilovolt (kV) Intertie (Intertie) under the terms of the interim solution (see Appendix A). PG&E, Edison, SDG&E, Santa Fe Geothermal, Inc. and Ultrasystems, Inc. (Ultrasystems), Independent Energy Producers (IEP), Cogeneration Services, Inc.-Hydropool (Hydropool), and staff presented witnesses. Concurrent briefs were filed by May 24, 1985.

III. Transmission System Limitations

A. PG&E's Transmission System

1. Transmission Constraints

James H. Malinowski, PG&E's Chief Transmission Planning Engineer, testified that transmission capacity is not currently

available in some areas of PG&E's northern system. Malinowski stated that from 1980 to 1984, the megawatts (MW) of signed QF contracts increased from 204 MW to 6,593 MW. Malinowski asserted that this unexpected increase in QF power exceeded available transmission capacity in its northern system.

According to Malinowski, the availability of transmission capacity is dependent on existing and future load levels as well as existing and future generation. In PG&E's northern area, generation consists of area hydro, imports, geothermal, Rancho Seco, other entities, and QFs. This anticipated generation will exceed the expected load during certain hours of each year for the next ten years.

In PG&E's southern area, the company is monitoring the development of large enhanced oil recovery projects to determine if capacity constraints will emerge.

Malinowski sponsored the following table showing that the northern system already has a resource-load imbalance:

Load, Excluding System Line Losses (MW)
and
Resources, Excluding Northwest Import (MW)

Main Area	Installed Capacity	Typical Resources On Line	Peak Load	Surplus Resources	Resources Needed to Meet Load
Northern	8,892	7,290	5,328	1,962	—
Bay Area	4,670	2,232	5,540	—	3,308
Southern	7,290	5,366	5,062	304	—

Northern Area includes SMUD and Humboldt, Shasta, Colgate Drum, De Sabla, North Bay, Sacramento, and Stockton Divisions.

Bay Area includes San Francisco, East Bay, and San Jose Divisions.

Southern Area includes MID, TID, and San Joaquin and Coast Valleys Divisions.

Malinowski stated that most of the northern area's 1,962 MW of surplus resources will be transmitted to meet Bay Area load.

According to Malinowski, this transfer of power will fully load some bulk transmission lines. As a result, any additional QF power in the northern area would cause these transmission lines to overload.

PG&E has conducted a study to determine which lines would be overloaded during the summer peak and the spring partial peak periods. This study showed that the existing bulk transmission system had no available capacity for firm deliveries of QF power. Malinowski testified that under normal conditions the following 230 kV lines and 500 kV capacitors would be overloaded:

a. Gold Hill-Tesla
b. Rancho Seco-Tesla
c. Bellota-Tesla Nos. 1 and 2
d. Tracy-Tesla Nos. 1 and 2
e. Vaca-Dixon-Contra Costa Power Plant (CCPP) Nos. 1 and 2
f. Vaca-Dixon-Moraga Nos. 1 and 2
g. Round Mountain-Table Mountain 500 kV series capacitors.

Malinowski also testified that constraints exist in several area transmission systems within the northern system. In most of these areas, which are rural or suburban, the load and expected load growth is small compared to urban areas. Consequently, existing transmission lines are of relatively low capacity. In addition, the area generation often exceeds the area load. The following table shows the available transmission capacity in the northern areas:

Sub Area	Load (MW) Maximum	Load (MW) Minimum	(MW) Existing and Planned Generation	(MW) Maximum Export
	(A')	(A)	(B)	(C)= (B-A)
Humbolt Division Includes Trinity County — Shasta	130	40	128	88
Pit 1 System	19	5	106	101
Cedar Creek 60 kV Area	3	1	7	6
Battle Creek 60 kV Area	3	2	38	36
Caribou 60 kV Area	75	34	78	44
Feather River Area	0	0	339**	339
Paradise 60 kV Area	40	16	38	22
Colgate 60 kV Area	52	17	417	365***
North Bay North	220	132	245	113
North Bay South	865	519	2,132	1,613
Drum Division	4	2	174	172

Sub Area	(MW) Existing Transmission Capacity	(MW) Available Transmission Capacity	(MW) Potential Of Generation**** Allocated	(MW) Potential Of Generation**** Wait List
	(D)	(E)-(D-C)		
Humbolt Division Includes Trinity County — Shasta	88	0-90*	90.0	136.5
Pit 1 System	106	5	4.5	40.0
Cedar Creek 60 kV Area	16	10	27.0	0.5
Battle Creek 60 kV Area	36	0	4.5	4.0
Caribou 60 kV Area	84	40	70.0	20.0
Feather River Area	390	51		
Paradise 60 kV Area	37	15	0.5	63.0
Colgate 60 kV Area	365	0	20.5	12.0
North Bay North	113	0	20.0	59.0
North Bay South	1,613	0	382.0	862.5
Drum Division	172	0	20.0	7.3

* 90 MW available if Humboldt Bay units 1 and 2 are backed down.

** Includes 44 MW of import from the Caribou 60 kV area.

*** B - A'

**** List as of February 8, 1985.

2. Transmission Upgrades

Malinowski testified that two groups of transmission upgrades to its bulk transmission system have been identified. The first group will provide transmission carrying capability for an additional 1,150 MW of QFs interconnecting under the terms of the interim solution. (See D.84-11-123 modifying D.84-08-037.) These bulk upgrades, their estimated cost, and expected operating dates are as follows:

Potential Bulk Transmission Upgrades
For First 1,150 MW of Added QF Power

	Estimated Cost (in Million of 1984 Dollars)	Expected Operating Date
String a second 230 kV circuit from Gold Hill to Tesla	3.4	March 1988
Add about 500 MVARS of shunt capacitors	8.0	June 1989
Build an additional 230 kV DCTL from Bellota to Tesla	18.2	December 1989
Rebuild the Vaca-Dixon-Contra Costa 230 kV DCTL	37.2	December 1990
Rebuild the Vaca-Dixon-Moraga 230 kV DCTL	55.4	June 1991
Add second 500/230 kV transformer bank at Tesla.	15.5	June 1992
Total	137.7	

The second group of bulk upgrades will accommodate the transmission requirements of an additional of 2,000 MW of QF power in the northern area. Approximately 2,000 MW of QFs are on a PG&E waiting list for transmission capacity in the northern area. These upgrades and their estimated cost are as follows:

Potential Bulk Transmission Upgrades For Another 2,000 MW of Northern QF

	Estimated Cost (in Millions of 1984 Dollars)
Upgrade Round Mountain series capacitors	$ 26.1
Build new Table Mountain — Tesla section of the 500 kV line and install series capacitors and transformer banks at both ends	154.8
Replace conductors of Weber-Tesla section of the Bellota-Tesla 230 kV DCTL with SSAC	7.5
Add two circuits of two 3,500 kcmil cables at the underground section of Castle Rock Junction-Lakeville line	5.4
Rebuild the Lakeville-Vaca-Dixon 230 kV DCTL with 2-1113 kcmil AAL conductors	27.8
Total	$ 221.6

Finally, Malinowski described planned area transmission upgrades as follows:

Area Reinforcements

	Area Reinforcements				
	Transmission Capacity (MW)				
Area	Available	To Be Added	Estimated OD	Cost* $ x 1000	$/Kilowatt (kW)**
Pit 1	5	100	1988	9,000	90
Cedar Creek	10	38	1987	4,400	116
Battle Creek	0	25	1987	2,000	80
Caribou 60 kV & Feather River	40	100	1990	13,500	135
Paradise	15	50	1987	3,000	60
Colgate	0	30	1988	2,500	83
North Bay North	0	80	1988	5,500	69
North Bay South	—	—	—	—	—

* In 1985 dollars.

** $/kW of area transmission capacity added — excludes $199/kW of bulk transmission costs.

U.S. Windpower, Inc. (USW) in its brief stated that PG&E has provided incomplete information on transmission constraints in the Altamont Pass area. Malinowski during cross-examination testified that there are transmission constraints in this area. He further stated there is a waiting list of at least 700 MW of QFs

desiring transmission capacity in this area.[1] USW observes that PG&E has not provided examples of planned upgrades which will relieve these constraints in Altamont Pass.

B. Edison's Transmission System

Edison does not expect to have any transmission limitations during the ten-year period ending in 1994 that will constrain QF development. E. M. Helm, Senior Planning Engineer, testified that the company's Fall 1984 Generation Resource Plan has 3,250 MW of renewable and alternate resources for the period 1985-1994. Helm stated that Edison has planned to develop its transmission system to accommodate these QF facilities. Accordingly, Edison does not expect any major difficulty in integrating QFs into its resources.

C. SDG&E's Transmission System

SDG&E also does not anticipate any bulk transmission constraints in its service territory which will limit QF development over the next ten years. Ronald Erdman Busher, Supervisor of Transmission Planning, identified two areas which have potential limitations: Boulevard and Warner Springs. However, Busher further testified that the actual QF development in these two areas will not surpass the line capacity in these areas. Thus, SDG&E believes there also are no significant area transmission limitations in its system.

IV. Transmission Cost Allocation

After studying the utilities' evaluations of their transmission systems, the parties examined transmission cost allocation approaches. The staff held a workshop to see if the parties could agree upon a basic allocation of most transmission upgrade costs

---

[1]By letter dated July 3, 1985, counsel for PG&E informed the administrative law judge (ALJ) that certain transmission lines in the Altamont Pass area have been "uprated" to accommodate most of the QFs on the waiting list.

to utilities and their ratepayers. General agreement was reached; however, minor differences arose during the hearings.

The staff, through its witness Julian Ajello, stated that utilities have the responsibility for anticipating the growth of QF resources. Utilities also must plan and construct adequate transmission capacity. Ajello emphasized that QFs are a significant portion of utility resource plans and therefore must be considered in utility transmission plans. Ajello further stated that the cost of transmission capacity which has multiple purposes is a legitimate ratepayer expense. Thus, staff believes the cost of transmission lines or upgrades should be allocated to ratepayers unless the transmission facility does not serve multiple purposes.

PG&E believes that the reasonable cost of nondedicated facilities necessary to take QF power should be paid by ratepayers. However, PG&E's witness Malinowski asked the Commission for guidance on the reasonableness of a transmission facility cost. Malinowski suggested that a cost cap of about $150/kW could be used as a guideline for determining reasonable area transmission costs. Malinowski explained that the company really was seeking Commission approval of the concept of a cap as a guideline and not for the fixing of a particular cap.

Edison urges the Commission to approve the company's current allocation under which the QF pays for transmission facilities which are directly related to or required by QFs. If an upgrade is not directly required by or solely beneficial to a QF, the QF has no cost responsibility. In other words, as Edison's witness Helm stated, if a transmission facility has system benefits, then the QF need not pay for it.

SDG&E asserts that its analysis of a transmission facility's cost is the same for QFs, all other resources, and customers. SDG&E analyzes the following factors for each transmission line:

1. Future system growth needs
2. System security and reliability
3. Emergency support
4. Economy energy access

5. Transmission losses
6. Transfer capability
7. Firm resources at system peak conditions
8. Cost effectiveness

SDG&E believes that each transmission line or upgrade must be evaluated under the above criteria. SDG&E submits there is no need for the Commission to change the company's existing transmission planning method.

IEP asserts that it is the utility's obligation to plan and to build transmission upgrades or lines when there are benefits to ratepayers. IEP submits that as a general rule most transmission upgrades or lines will have system benefits and therefore should be paid for by the utility's ratepayers.

IEP asks the Commission to adopt a cost cap to provide some certainty about QF access to transmission. IEP proposes that any transmission project undertaken at an estimated expense below the cost cap would be presumed reasonable. In this way, IEP asserts a QF will have an indication of what transmission lines should be built by the utility to accept QF power.

IEP's witness Jan Hamrin testified that a cap of about $180/kW is appropriate for all utilities' area transmission lines. Hamrin agreed with PG&E's witness Malinowski that all bulk transmission lines have generalized system benefits. Accordingly, a cost cap for bulk transmission lines is unnecessary since the ratepayers always are responsible for these lines.

Ultrasystems submits that a cost cap for transmission projects should not be adopted. Ultrasystems states that the adoption of a cost cap would assume a long-run avoided cost for the utility which has not yet been determined. Ultrasystems argues that until the long-run avoided cost methodology is determined, a transmission cost cap cannot be adopted.

Pacific Lighting Energy Systems (PLES) agrees that QFs should not be responsible for transmission facilities which have system-wide benefits to customers. PLES points out that this general concept is expressed in several ways by the different

utilities. Accordingly, PLES recommends that the Commission adopt Edison's language as the standard for all utilities to avoid different applications by the utilities.

In addition, PLES submits that a cost cap, if adopted, should be used only as a general guideline in assessing the reasonableness of a transmission project. PLES emphasizes that a QF should have the right to come to the Commission if a utility refuses to build a transmission upgrade or line because its cost exceeds the cost cap.

V. Refund of Interim Solution 1.7 Mills/ Kilowatt-hour (KWh) Assessment

PG&E and staff recommend that since QFs should not be held responsible for the cost of most transmission upgrades, 1.2 mills/kWh should be refunded from any payments received under the terms of the interim solution. In addition, the 1.7 mills/kWh charge should be reduced to .5 mill/kWh prospectively. The interim solution provided that 1.2 mills/kWh of the 1.7 mills/kWh is refundable if the Commission determines that QFs have no cost responsibility. However, PG&E believes the interim solution is unclear as to what QFs should pay after the Commission's decision is issued. PG&E and staff assert that it is equitable for QFs to continue paying .5 mill/kWh over the life of the contracts since the QFs are receiving the benefits of transmission access before the transmission upgrades and lines necessary to accommodate their deliveries are completed.

The QFs maintain that no assessment is appropriate after the Commission issues a decision finding that QFs usually will have no cost responsibility. The QFs assert that the Commission cannot in "good conscience" assess a continuing charge of .5 mill/kWh, no matter how small, after it determines that QFs are not responsible for transmission upgrades or lines.

VI. Discussion

A. QFs generally are not responsible for the cost of transmission upgrades or lines.

QF deliveries are a significant part of each utility's resource plan. Accordingly, utilities must plan for and otherwise enable QF facilities to interconnect with their transmission systems in an expeditious manner. We recognize that both the diversity and the number of emerging QFs in PG&E's system have created new problems for the company's transmission planners. However, PG&E along with the other utilities must learn to facilitate the addition of QF power as it already has learned to accept power deliveries from all other resources.

The parties have agreed among themselves that QFs should not be responsible for the cost of transmission facilities which serve multiple purposes. The parties find since the ratepayers in the past have paid for these transmission facilities, the ratepayers should continue to absorb the cost as long as the transmission facility has system-wide benefits. A QF is responsible only for interconnection and other facilities that have no system-wide benefits and are solely beneficial to the QF. This approach eliminates the need for a difficult cost allocation among the various users of a transmission facility.

System-wide benefits can mean many things as shown in SDG&E's list of factors affecting its transmission planning. Thus, we believe that nearly all transmission facilities arguably may have some system-wide benefits. Bulk transmission lines by definition have system-wide benefits. And nearly all area lines probably will have some system-wide benefits. Thus, QFs will assume cost responsibility only on the rare occasion that an area line lacks any perceptible system-wide benefit.

On occasion, a transmission facility's cost may outweigh its system-wide benefits. In this event, the QF perhaps should be responsible for any excessive cost caused by the interconnection of its facility to the utility's system. A rigorous cost-benefit analysis, however, touches upon many as yet undefined criteria. We have yet to determine a long-run avoided cost methodology for QFs. We have not yet adopted consistent energy reliability

criteria for all utilities. The cost of transmission service is just one piece to the puzzle of properly valuing QF power. Thus, for the moment, we will allow utilities to follow the general principle that as long as a transmission facility has system-wide benefits, the utility's ratepayers are responsible for the prudent and reasonable cost. The QF is responsible only for interconnection cost and other special facilities which have no system-wide benefits. Refinement of this principle must await our determination in the long-run avoided cost proceedings.

B. A transmission cost cap can be a useful guideline for utilities and QFs.

PG&E has asked for Commission approval of the concept of a cost cap. PG&E's witness Malinowski carefully explained that a cost cap would help PG&E in its transmission planning for QFs as a benchmark of costs that will be absorbed by ratepayers. However, Malinowski went on to say that PG&E would continue the same analysis in its transmission planning that would occur without the guideline of a cap. The concept of a cost cap is attractive but the calculation of the level of a cap involves many of the previously mentioned criteria which are not well-defined. To the extent a cost cap will be added to PG&E's existing analysis and will not become an accepted substitute for the usual study of a proposed transmission facility, it may refine and improve PG&E's current transmission planning process. Thus, we will permit PG&E to develop a cost cap and use it as a tentative guideline in its planning.

We caution PG&E that its calculation of a cap may be examined by QFs and staff. The level of a cap may vary greatly depending on the selected assumptions. The information underlying the derivation of any cap should be shared with all interested parties. A QF may, by complaint to the Commission, allege that a selected cap is unreasonable and thereby bring the reasonableness of the utility's calculation into issue.

C. A .5 mill/kWh assessment should continue until the transmission upgrades associated with the interim solution are completed.

Under the terms of the interim solution, 1.2 mills/kWh of the 1.7 mills/kWh assessment is refundable if the Commission finds the QFs have no cost responsibility for transmission upgrades. Since we have determined that QFs have virtually no responsibility for transmission facilities with system-wide benefits, 1.2 mills/kWh clearly should be refunded.

Since QFs participating in the interim solution will receive access to transmission before the associated upgrades are completed, we find it is reasonable to continue a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed. The payment is a minimal offset to the potential diseconomies identified by PG&E. However, since PG&E has stated that the diseconomies will end once the upgrades are completed, there is no reason to continue the assessment beyond the completion date. Therefore, as each upgrade is completed, the QPs whose delivery was constrained by that line no longer should be liable for a .5 mill/kWh charge.

D. PG&E's Petition to Modify the Interim Solution to Exclude the Intertie should be granted.

Deleted per Decision No. 86-02-033.

~~The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling and grant PG&E's Petition to Modify D.84-08-037. We find after reviewing the evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution. We do not reach the larger question of whether and, if so, under what conditions QFs ever should have access to the Intertie.~~

~~Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. Issues to be~~

~~addressed in that proceeding will include, but will not be limited to:~~

Per Decision No. 86-02-033, the following language was substituted for the first two paragraphs under Section "D".

> "The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling, incorporate it by reference herein, and grant PG&E's Petition to Modify D.85-08-37. We find after reviewing the evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution.
>
> "We stated in D.85-06-163, the Orphan Contracts decision, that resolution of PG&E's Petition to Modify would determine the ability of Hydropool to enter Standard Offer 4 agreements with PG&E. Our decision to grant PG&E's Petition means, of course, that Hydropool does not have the ability to enter Standard Offer 4 agreements under the terms of the interim solution, as long as its interconnection is through the Intertie. We note that we need not reach the issue of whether Hydropool's Standard Offer 4 tenders complied with all requirements prior to our having prospectively suspended Standard Offer 4.
>
> "We stress that this decision does not determine *access* to the Intertie. No one has declared that Hydropool cannot use the Intertie to deliver power to PG&E. The dispute is one over the price which must be paid for that power. The evidence in this case supports our decision, made in response to a documented, critical but temporary situation of transmission system constraints, not to make Standard Offer 4 prices available to *any* QF interconnecting with the Intertie. The record nowhere indicates and, in fact, contradicts any notion that either the Commission, the Commission staff, the respondent utilities, or any QF ever contemplated that our Standard

> Offers applied to such interconnection, particularly in such circumstances. We do not know whether the institutionalized avoided cost of Standard Offer 4 is appropriate for a situation where, because of the Intertie interconnection, a QF's power of necessity will always displace economy power from the Northwest whenever such power is available to fill PG&E's capacity entitlement. We do not believe PURPA requires such a result, without convincing evidence that PG&E's avoided cost in such a situation is indeed equivalent to the Standard Offer 4 price.
>
> "Finally, we do not reach the larger question of whether, and, if so, under what conditions, QFs ever should have access to the Intertie under a Standard Offer type of option. Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. Issues to be addressed in that proceeding will include, but will not be limited to:"

1. the extent to which unlimited power purchases resulting from interconnection of out-of-state QFs would cause displacement of economy energy, especially from the Northwest;

2. the feasibility of developing pricing and curtailment options to protect ratepayers from paying uneconomic prices to out-of-state QFs should we determine that out-of-state QFs ought to be given an opportunity to serve the California power market;

3. a comparison of California and non-California avoided costs, to provide a perspective on the relative attractiveness of California as a market for out-of-state QF power; and

4. an evaluation of the circumstances, if any, under which its would be appropriate to make standard offers available to out-of-state QFs and the form that such offers should take.

By examining the problems of how to deal with out-of-state QFs in a generic proceeding, we will avoid the risk of reaching a

conclusion on these issues based on the necessarily incomplete record and limited perspective raised in the current proceeding in which the focus was exclusively on Hydropool's projects. The question of whether Hydropool should be granted access to the Intertie will appropriately become part of the more general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection.

Findings of Fact

1. PG&E expects to have significant constraints in its northern transmission system during the next ten years which may affect QF development.

2. Edison and SDG&E do not expect to have any significant transmission constraints over the next ten years.

3. The parties agree that transmission facilities which have system-wide benefits should be paid for by ratepayers.

4. The parties agree that transmission facilities which lack system-wide benefits and are beneficial only to the QF should be paid for by the QF.

5. Bulk transmission lines have system-wide benefits and should be paid for by ratepayers.

6. Nearly all area transmission lines will have system-wide benefits and should be paid for by ratepayers.

7. A rigorous cost-benefit analysis of a transmission facility is dependent on criteria yet to be defined in other Commission proceedings.

8. QFs participating in the interim solution should be refunded 1.2 mills/kWh but should continue to pay a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed.

New Finding of Fact 8a (added pursuant to Decision 86-02-033):

8a. "D.85-06-163 stated that resolution of PG&E's Petition to Modify the interim solution by excluding the Intertie

would determine the ability of Hydropool to enter Standard Offer 4 agreements with PG&E."

9. The Intertie is different from other constrained transmission lines in PG&E's northern system since (1) QF interconnection to the Intertie may cause greater displacement of economy power than QF interconnection to other lines, (2) QF interconnection to the Intertie will affect PG&E's negotiations of power purchase deliveries over the Intertie, and (3) PG&E has never represented to QFs that interconnection to the Intertie would be acceptable without price adjustments or curtailment provisions.

10. This investigation should be closed so that the parties may devote their attention and resources to the pending OIR 2 proceedings and the determination of long-run avoided cost for QFs.

Conclusions of Law

1. Ratepayers in the past have paid for transmission facilities which serve multiple purposes. Ratepayers should continue to pay for transmission facilities which have system-wide benefits.

2. QFs participating in the interim solution should continue to pay a .5 mill/kWh assessment until the transmission upgrades which are intended to eliminate operating diseconomies are completed.

3. A rational basis exists for excluding the Intertie from the terms of the interim solution.

New Conclusions of Law 3a and 3b (added pursuant to Decision No. 86-02-033).

3a. "PG&E's Petition to Modify D.84-08-037 to exclude the Intertie from the terms of the interim solution should be granted."

3b. "Granting PG&E's Petition to Modify will have the effect of determining that Hydropool does not have the ability to tender Standard Offer 4 contracts to PG&E under the terms of the interim solution, but will not have the effect of excluding Hydropool from the Intertie under some other pricing arrangement."

4. The Commission should establish a separate proceeding to investigate the unresolved questions relating to the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place. The issue of whether Hydropool should be granted interconnection for its projects should be taken up in this new proceeding.

ORDER

IT IS ORDERED that:

1. Utilities shall require QFs to pay only for transmission facilities which lack system-wide benefits and are beneficial only to QFs.

2. QFs participating in the interim solution shall be refunded 1.2 mills/kWh and shall continue to pay .5 mill/kWh until the transmission upgrades associated with the interim solution are completed.

3. Pacific Gas and Electric Company's Petition to Modify D.84-08-037 is granted to exclude the Intertie from the terms of the interim solution.

4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place.

5. I.84-04-077 is closed.

This order becomes effective 30 days from today. Dated September 18, 1985, at San Francisco, California.

DONALD VIAL
President
VICTOR CALVO
FREDERICK R. DUDA
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate.

I will file a written dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

I.84-04-077
(Filed April 18, 1984)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California Electric corporations regarding transmission constraints on cogeneration and small power production development.

Appendix A

ADMINISTRATIVE LAW JUDGE'S RULING

Introduction

On April 12, 1985, counsel for Pacific Gas and Electric Company (PG&E) moved to dismiss the proceeding insofar as it involved the right of Hydropool — Cogeneration Services, Inc. (Hydropool) to interconnect to the Pacific Northwest — Pacific Southwest 500 Kv Intertie (Intertie). San Diego Gas and Electric Company (SDG&E) and the Commission's Public Staff Division (staff) moved to strike the evidence offered by Hydropool.

The Commission in Decision (D.) 84-11-123 granted a limited rehearing on the question of Qualifying Facility (QF) interconnection to the Intertie under the terms of an interim solution for transmission constraints in PG&E's service territory. Hearings were held on December 17, 1984, March 28-29, 1985, April 9, 10, and 12, 1985. John E. Kerler, Supervising Power System Engineer, testified on behalf of PG&E. Dennis E. Peseau, Senior Vice President and Senior Economist of Zinder Companies, Inc., Robert K. Weatherwax, Jr., President of Sierra Energy and Risk Assessment, Inc., and Ivan Gold, President of Cogeneration Services, Inc. and managing parnter of Hydropool, all testified on behalf of Hydropool. Further hearings were suspended until a ruling is issued on the motions.

PG&E, other utilities, and staff have argued that the intent of the signatories to the interim solution is the only relevant factor. They intended to exclude the Intertie from the interim solution.

Accordingly, they assert Hydropool or any other QF has no right to interconnect to the Intertie under the terms of the interim solution.

PG&E's witness Kerler explained why PG&E has excluded the Intertie from the interim solution. Kerler testified that at the time the interim solution was drafted, PG&E believed no firm capacity on the Intertie would be available for QFs. If QFs were allowed to interconnect to the Intertie, PG&E believed that the QFs would displace cheaper economy power from the Northwest.

PG&E asserts that the QFs which are allowed to interconnect to constrained bulk or area lines under the interim stipulation will cause only temporary operating diseconomies since transmission upgrades have been identified for those lines. Thus, PG&E agreed to allow QF interconnection to those lines because the company believes the lines' capacity can be increased and the diseconomies will end.

PG&E evaluation of the Intertie is quite different. PG&E has never believed that firm capacity on the Intertie will be available. Consequently, the company consistently has refused to give QFs any access to the Intertie.

Hydropool responded to PG&E's showing by attempting to show that excess capacity will be available on the Intertie and that other QFs could cause displacement of Northwest economy power.

Hydropool's witness Peseau testified that firm surplus resources in the Northwest and very favorable water conditions have resulted in high utilization of the Intertie in the last four years. Leseau asserted that the Northwest's large surplus should diminish and average water conditions should return in the future. He concluded that the declining firm surplus with average water conditions should not fill the expanding capacity of the Intertie.

Hydropool's witness Weatherwax examined PG&E's long range plans and determined that PG&E should not use all of its Intertie capacity over the course of any year for the next 20 years. Weatherwax stated that if Hydropool is permitted to interconnect its projects to the Intertie there will not be a one-to-one displace-

ment of Northwest economy power. In addition, Weatherwax testified that other QF projects may cause displacement of Northwest economy power during minimum load conditions. Thus, Weatherwax asserts Hydropool is similar to other QF projects in its impact on the PG&E transmission system.

Hydropool's witness Gold testified that the only economic market for the Hydropool projects is in California and the Intertie is the only transmission path for these projects. Without Commission approval, Gold stated that Hydropool's projects will not be built.

PG&E Motion to Dismiss

PG&E raises several grounds for dismissing Hydropool's claim in this proceeding. PG&E argues that Hydropool is not entitled to a QF contract, that Hydropool's marketing agreements are not legal under PURPA, and that Hydropool has failed to comply with Decision (D.) 84-08-037. In addition, PG&E maintains that no unlawful discrimination has been shown by Hydropool.

PG&E asserts that since Hydropool is not the owner or operator of its cogeneration and small power production facilities, Hydropool is not a QF under PURPA. PG&E points out that Hydropool is a broker or agent for QFs as it owns only a de minimis 2.5% holding in one facility.

Furthermore, PG&E claims Hydropool even lacked authority to execute power purchase agreements on behalf of the developers. PG&E asserts that Hydropool's marketing agreements with developers provide that Hydropool is merely to deliver power purchase agreements to the developer for the developer's execution.

PG&E submits that Hydropool is a broker for power and is not a QF. Accordingly, PG&E believes Hydropool's claim should be dismissed.

PG&E next argues that Hydropool's marketing agreements provide for deliveries of utility power at QF prices. The marketing agreements contain "shaping" provisions which permit substitu-

tion of a "shaping" utility's power for the QF's generation. PG&E submits that this "shaping" substitution clearly violates PURPA.

PG&E argues that Hydropool has not complied with the interim solution as approved by the Commission in D.84-08-037. The interim solution provided that priority rights for each transmission allocation are not transferable between projects. PG&E points out that only seven of the fourteen projects mentioned by Hydropool to PG&E in August, 1984, are still being pursued. PG&E asserts Hydropool has substituted other projects for some of the original projects in violation of D.84-08-037.

Finally, PG&E submits that no discrimination has been shown by Hydropool since no QF has been allowed by PG&E to deliver over the Intertie. PG&E points out that Hydropool was offered an opportunity to deliver power on a radial line to a PG&E area transmission line. Furthermore, PG&E claims that it has denied the request of another QF to interconnect to the Intertie. Thus, PG&E concludes that Hydropool has been treated in the same manner as other QFs.

Hydropool Response

Hydropool asks the Commission to deny PG&E's motion for several reasons.

First, Hydropool asserts that PG&E failed to make its motion upon five days written notice as required by Rule 56. Hydropool claims PG&E has known of Hydropool's agency relationship with its projects as early as November, 1984. Therefore, Hydropool argues PG&E's motion is improper and should be denied.

Hydropool also asserts that it was expressly authorized to act as agent for QF project owners. Hydropool claims that the owners verbally authorized its agency authority and subsequently ratified Hydropool's actions.

Hydropool points out that it has never received a transmission allocation under the interim solution since PG&E consistently has denied all requests for interconnection to the Intertie. Therefore, Hydropool submits it has not improperly shifted an allocation between projects.

Finally, Hydropool maintains that all QFs participating in the interim solution may cause displacement of Northwest economy power. Thus, Hydropool asserts that the seasonal displacement of Northwest economy power is not a valid basis for excluding only Hydropool's projects from the interim solution.

SDG&E and Staff Motion to Strike

SDG&E moved to exclude the testimony of Hydropool witnesses Peseau and Weathervax. Counsel for SDG&E argues that the interim solution rationally differentiates between classes of QFs. He asserts the Intertie is significantly different from the rest of PG&E's transmission system and is propertly excluded from the interim solution. To SDG&E, interconnection to the Intertie is a price issue which should be addressed in another proceeding.

Staff joined SDG&E in moving to strike the testimony of Peseau and Weathervax. Staff believes the only relevant issue is the intent of the interim solution. Staff further argues that Hydropool's witnesses have not shown that one-to-one displacement of economy power will not occur if its projects interconnect to the Intertie.

Discussion

The purpose of the interim solution was to enable QFs in PG&E's constrained northern transmission system to proceed with their projects until these constraints are relieved by transmission upgrades and new transmission lines. The terms of the interim solution were limited to QFs located within PG&E's service territory. The Commission in D.84-08-037 removed the in-service area restriction and stated: "At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries."

PG&E immediately filed a petition for modification of D.84-08-037 asserting that it intended to exclude the Intertie from the interim solution because interconnection to the Intertie could result in one-to-one displacement of economy power. PG&E also asserted that this displacement would not be relieved by planned

transmission upgrades or new transmission lines. PG&E then asked the Commission to exclude the Intertie from the interim solution as a matter of policy.

The Commission declined to exclude the Intertie from the interim solution and instead ordered a limited rehearing on this matter. (See D.84-11-123.)

The issue addressed in the limited rehearing is whether PG&E's proposed exclusion of the Intertie from the interim solution is a reasonable distinction among its constrained transmission lines or unlawful discrimination against a class of QFs.

The California Supreme Court in *United States Steel Corp. v Public Utilities Commission*, 29 Cal, 3d 603 (1981) set forth some guidelines for the Commission's determinations on claims of discrimination. The Court affirmed the Commission's wide discretion in prescribing economic classifications but stated that mere administrative inconvenience may not justify an imprecise classification. The Court observed that the Commission's finding of administrative "difficulty" to support a rate exemption was inadequately supported by record evidence. (29 Cal. 3d at 614.) Here it is unlikely that the mere declaration of the signatories' intent would be considered a sufficient basis for the exclusion of one transmission line and QFs in proximity to that line from the interim solution.

The record for this proceeding now contains sufficient evidence for a Commission finding. Prior to hearing, the Commission lacked any evidence apart from a PG&E petition alleging that permanent one-to-one displacement of economy power could result from QF interconnection to the Intertie. At hearing, PG&E was required to present a witness to substantiate its claim. Hydropool was permitted to cross-examine and was given an opportunity to present rebuttal witnesses. In addition, PG&E stated it wants to present additional evidence should the Commission find that its initial presentation is lacking.

The salient facts developed in the record are as follows.

In recent years, PG&E's capacity entitlement on the Intertie was fully utilized due to above average hydro conditions. Based on

this recent experience, the company may predict that all of its capacity on the Intertie could be used in the next few years. Assumption of average hydro conditions would lead to a different conclusion, i.e., capacity will be available most of the year. However, at times such as during the spring run-off months, the Intertie will be fully used even under average hydro conditions. If allowed to interconnect, Hydropool's projects will displace economy power at these times.

The QFs allowed to interconnect to other constrained transmission lines also may cause displacement of economy power on the Intertie. Under minimum load conditions, surplus area generation may be transmitted from the northern area to the Bay Area over the Intertie. To the extent QF deliveries in the northern area cause a resource-load imbalance, these QFs may displace economy power deliveries over the Intertie if other PG&E resources are not curtailed.

PG&E has claimed that the operating diseconomies expected under the interim solution are temporary. However, the transmission upgrades associated with the interim solution will not relieve a capacity constraint on the Intertie. Thus, the diseconomy of Intertie back-offs may continue after these upgrades are completed.

PG&E never has allocated firm capacity on the Intertie to a QF. PG&E instead has offered to purchase QF power delivered on the Intertie on an interruptible basis or at prices competitive with economy power.

From these facts, one may find a few differences between QF interconnection to the Intertie and to other constrained transmission lines. First, direct interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PG&E's capacity entitlement. Interconnection to other transmission lines will cause displacement only when such economy power is available *and* uncurtailed area generation exceeds area load. Consequently, the amount of displacement from QF interconnection to the Intertie may exceed any Intertie back-off caused by other QF interconnection to other lines. Second, direct interconnection will reduce PG&E's available firm capacity on

the Intertie in its negotiations of long term capacity contracts in the Northwest. Other QF interconnections to other lines will not alter PG&E's negotiating posture. Third, PG&E never has represented to QFs that it would accept firm QF deliveries on the Intertie without price concessions. On the other hand, until PG&E's discovery of unforeseen constraints in its northern transmission system, PG&E expected QF interconnection to other transmission lines to occur under the various approved standard offers in the ordinary course of business. Thus, there is a basis for distinguishing the Intertie from other constrained transmission lines.

Ruling

The objective of this proceeding and the interim solution has been to allow QF development to proceed despite the unforeseen transmission constraints in PG&E's northern transmission system. This objective has been reasonably met by the interim solution without unlawful discrimination against a class of QFs. No further hearings are required on the issue of QF interconnection to the Intertie under the terms of the interim solution. The Commission may modify D.84-08-037 to exclude the Intertie from the interim solution as requested in PG&E's petition for modification. Alternatively, the Commission may deny PG&E's petition and allow Hydropool to participate in the interim solution as a matter of policy.

The various motions to strike or exclude Hydropool's evidence are denied as the Commission should issue a decision based on findings drawn from this evidentiary record. PG&E's objections to Hydropool's standing as a QF will be addressed if the Commission should find that QFs should be allowed to interconnect to the Intertie under the terms of the interim solution.

Dated July 30, 1985, at San Francisco, California.

/s/ RANDOLPH L. WU

Randolph L. Wu
Administrative Law Judge

APPENDIX I

California Administrative Code Title 20
Section No. 63

63. (Rule 63) Authority. The presiding officer may set hearings and control the course thereof; administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission.

California Public Utilities Code
Section No. 451

451. All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

California Public Utilities Code
Section No. 1709

1709. In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

California Public Utilities Code
Section No. 1757

1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of

the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission or reasonableness and discrimination.

Code of Federal Regulations
18 C.F.R. § 292.401(a)

§ 292.401 Implementation by State regulatory authorities and nonregulated electric utilities.

(a) *State regulatory authorities.* Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

Code of Federal Regulations
18 C.F.R. § 292.304(c)(ii)

(c) *Standard rates for purchases.* (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

DISTRIBUTED
DEC 11 1986

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-686

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS THE APPEAL

JAMES E. HARRINGTON
(Counsel of Record)
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
101 CALIFORNIA ST.
SAN FRANCISCO, CA 94111
(415) 434-4000

COUNSEL FOR APPELLANTS

TABLE OF CONTENTS

I. Introduction 1

II. Appellees' Mischaracterizations of the Record 1

A. Availability of Standard Offers to Out-of-Area QFs 1

B. Displacement of Economy Power 3

C. The Alleged Disproportionate Impact of Hydropool's Deliveries 7

D. The Alleged "Alternative" of Delivering Power over Other Transmission Lines 9

E. Expansion of the Commission's Investigation to Encompass All Out-of-Area QFs 11

F. Other Misstatements 14

III. The "Ripeness" Question 15

IV. Summary and Conclusion 18

TABLE OF AUTHORITIES

Cases

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 20

Greene v. United States, 376 U.S. 149 (1964) 18

Hillsborough Township v. Cromwell, 326 U.S. 620 (1946) 18

Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333 (1977) 8

Maine v. Taylor, __ U.S. __, 106 S.Ct. 2440 (1986) 8

McNeese v. Board of Educ., 373 U.S. 668 (1963) 18

Montana Natl. Bank v. Yellowstone County, 276 U.S. 499 (1928) 18

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 20

Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926) 18

I. Introduction

Appellees' motions to dismiss this appeal contain several serious misstatements of fact. Since the Court cannot feasibly investigate the accuracy of appellees' assertions by an independent review of the record at this stage of the proceeding, the burden falls on appellants to expose these mischaracterizations. Given the strict limitation on the length of a responsive brief of this kind and the sheer number of appellees' misstatements, the performance of this task will necessarily occupy nearly all of the content of this brief. Except for a short discussion of the "ripeness" issue and a concluding summary of the parties' positions, appellants will be required to forego any additional response to appellees' arguments other than what already appears in the Jurisdictional Statement.

II. Appellees' Mischaracterizations of the Record

A. Availability of Standard Offers to Out-of-Area QFs

Both of the appellees represent to the Court that the various "standard offers"

developed by the Commission were and are generally unavailable to any QF located outside the purchasing utility's service area.* These assertions could not be further from the truth. As pointed out in the Jurisdictional Statement, the very decision of the Commission that established the terms of its standard offers dealt at some length with this issue and unequivocally concluded that each utility should be required to extend its standard offers to any QF who desired to "wheel" power to it from outside its service area (J.S.App. C, pp. 107-12). This policy was thereafter consistently applied and was indeed reaffirmed by the Commission in the specific context of the present controversy. It will be recalled, in that regard, that PG&E initially proposed a version of the "interim solution" to its transmission constraints which would have

---

* Thus, the Commission's brief describes the standard offers as "contracts which QFs within the California utilities' service areas could enter into with those utilities" (PUC Brief, p. 3; emphasis in original). PG&E's brief similarly recites that "Standard Offer forms cannot be used for out of area projects for technical problems independent of the underlying dispute" (PG&E Brief, p. 26).

excluded out-of-area QFs from participation in that arrangement, and that the Commission expressly rejected that restriction and expanded the interim solution to encompass out-of-area QFs in response to a petition by Hydropool and two California QFs who were located outside PG&E's service area (J.S.App. H, pp. 8-9). It was only at this point that PG&E, while acquiescing in the inclusion of the two California QFs, persuaded the Commission to reverse its decision solely with respect to Hydropool by focussing the Commission's attention on the separate "question of the terms and conditions, if any, under which out-of-state QFs should be allowed intercon- nection" to PG&E's transmission system (J.S. App. B, p. 16a; emphasis added). That was the first time that any utility was ever allowed to withhold a standard offer from any QF on the ground that the QF was located outside its service area.

B. Displacement of Economy Power

Although both appellees incorrectly suggest that the Commission acknowledged from the outset that potential displacement of economy

energy would constitute a valid excuse for a utility's refusal to accept QF power (PUC Brief, p. 4n.4; PG&E Brief, p. 9n.8), the Commission's counsel's assertion to that effect is the more surprising in light of the particular item of evidence which they cite in purported support of that assertion. In this connection, the Commission states in its brief:

> "In a decision in an unrelated proceeding, a 1983 PG&E general rate case, the Commission stated: 'Before committing transmission resources to QFs, we would want to ascertain whether Northwest power would be displaced as a result.' Decision 83-12-068, Dec. 22, 1983, at 331 (unpublished). This illustrates the Commission's early and ongoing concern with the problem of QF displacement of transmission capacity reserved for economy energy." (PUC Brief, p. 4n.4).

It is ironic that the Commission's counsel should choose this particular out-of-context quotation from the decision in the 1983 rate case to support its present position on this issue, because the Commission itself has previously issued a contempt citation to PG&E for its identical reliance upon this identical quotation to support an identical position on this same issue in an earlier proceeding. As noted in the Jurisdictional Statement, when the

Commission first learned of PG&E's transmission constraints, it reprimanded PG&E for its failure to disclose this problem at an earlier time and for its attempt to deal with the problem unilaterally by imposing certain restrictions on its acceptance of any QF power that might displace economy imports (J.S.App. F, pp. 58-71). In defense of its actions, PG&E cited the very passage from the opinion in the rate case which is now relied upon in the Commission's brief as alleged evidence of the Commission's "early and ongoing concern" with displacement of economy energy (id., p. 59). In response to PG&E's citation of this passage, the Commission chided PG&E for "tak[ing] this statement out of the context of the limited record we had before us in the rate case, [and] apply[ing] it to its alleged current transmission constraints" as a basis for refusing QF deliveries (id., p. 59; see also id., pp. 67, 89). The Commission went on to reject PG&E's contention that potential displacement of economy energy was a sufficient justification for the refusal of QF power, and

issued an order to show cause why PG&E should not be held in contempt for refusing QF deliveries on this ground in the face of the Commission's earlier decisions affirming the availability of standard offers to all QFs regardless of the existence of any such problem (id., pp. 59-71).* In view of this record, there is a distinct element of hypocrisy in the Commission's current effort to invoke this same quotation to justify PG&E's refusal of Hydropool's deliveries on this same ground.

The true facts respecting this issue are as recited in the Jurisdictional Statement. As was there shown, the Commission repeatedly and emphatically declined to accept potential displacement of economy power as a valid excuse for refusing to accept power deliveries from any QF, and instead consistently held that this factor should simply be taken into account in

---

* PG&E was ultimately acquitted of the contempt charge, but only after the Commission found that the evidence presented in its defense had "done little to dispel our uncertainty regarding either PG&E's compliance with our decisions or its commitment to the development of alternate generation" (Decision No. 84-08-031, p.33; see J.S.App. G).

computing the utilities' system-wide average avoided costs for the purpose of setting the prices for purchases of QF power in their standard offers (J.S.Apps. C, pp. 72-78; D, p. 114; E, p. 38; F, pp. 59-71; H, pp. 8-9). Once again, the Commission was persuaded to reverse itself on this issue only when it confronted the "special case" presented by the "out-of-state" location of Hydropool's projects.

C. The Alleged Disproportionate Impact of Hydropool's Deliveries

PG&E states in its brief that "Hydropool would displace as much [economy] energy as it generates," and then proceeds, from that premise, to construct an elaborate mathematical proof that Hydropool would displace "seven times as much low cost energy" as would the California QFs whose output would also flow on the Intertie (PG&E's Brief, p. 21). The proof is fallacious because the premise is false. As the record shows and as PG&E itself admits elsewhere in its brief, Hydropool would displace economy imports only during certain hours of the day in a single season of the

year, and would therefore not even come close to displacing "as much energy as it generates" (PG&E Brief, p. 20; J.S.App. X, pp. 360-61, 365, 835; PG&E Brief, App. B-5-6).

Appellants have conceded in their Jurisdictional Statement that, even though the displacement caused by Hydropool's output is miniscule, in absolute terms, by comparison with that caused by the numerous California QFs whose output flows on the Intertie (see J.S.App. U, p. 16), there are certain limited conditions under which Hydropool might theoretically cause a proportionally greater displacement of economy imports than a California QF delivering an equivalent amount of energy. There is no evidence in the record, however, that would establish either the reality or the extent of this differential impact. PG&E cannot remedy this deficiency in its proof simply by misstating the facts.*

---

* Appellees of course bear the burden of proof on this issue. Maine v. Taylor, __ U.S. __, 106 S.Ct. 2440, 2448 (1986); Hunt v. Washington State Apple Adv. Comm., 432 U.S. 333, 353 (1977).

D. The Alleged "Alternative" of Delivering Power over Other Transmission Lines

Appellees repeatedly assert that Hydropool "chose" to attempt delivery of its output over the Intertie in preference to an "alternative" method of transmission which it rejected "for its own business reasons" (PUC Brief, pp. 2, 10, 16; PG&E Brief, pp. 15, 22). While these assertions are not fabrications in the strict sense, they were surely made with tongue in cheek. For obvious reasons, the only practical way for a QF to deliver its output to a purchasing utility is over the transmission lines of the local utility with which it is already connected or from which it would ordinarily obtain its electrical service (see J.S.App. C, pp. 108, 141; 45 Fed.Reg. 12217, 12221). All of Hydropool's projects, naturally, are connected to or served by Washington and Oregon utilities whose only ultimate point of connection to PG&E's system is over the Intertie that links the Northwest power grid to the transmission systems of the California utilities (see J.S.Apps. S, pp. 4-5;

U, att. 1).* The Intertie is thus the only available existing route for transmission of Hydropool's output to PG&E (J.S., App. S, p.12). Hydropool's only "alternative" to the use of the Intertie for this purpose, therefore, would consist of the construction of its own private transmission line across the several hundred miles between its projects and the nearest PG&E area line, an undertaking which is obviously well beyond the financial capacity of Hydropool or any other small power producer. As indicated by the testimony cited by appellees in support of their assertions on this issue, however, this was precisely the "alternative" method of transmission which PG&E suggested to Hydropool and which appellees now assert that Hydropool "chose" to reject "for its own business reasons" (PG&E Brief, App. B-12-13). Although this testimony does not ex-

---

* As appellees note in their briefs, there is one other, much smaller transmission line that crosses the California border in the southwest corner of Oregon (J.S.App. U, att. 1). This line is not accessible by any of Hydropool's projects, and is therefore of no relevance whatever to the present dispute (J.S.App. S, p. 12).

plicitly reflect whether PG&E's suggestion in this regard was initially made in jest, appellees' representation to this Court that this absurd proposal actually afforded Hydropool a serious alternative to the use of the Intertie to transport its output to PG&E is certainly a joke gone sour.

E. Expansion of the Commission's Investigation to Encompass All Out-of-Area QFs

The last of the misleading arguments that will be examined here reflects not so much a mischaracterization of the record as it does a subterfuge previously perpetrated by the Commission itself. This is the argument that the Commission has effectively eliminated the basis for any charge of discrimination against interstate commerce by revising its challenged order, in purported response to Hydropool's petition for rehearing, to encompass an expanded investigation into "the broader issues of out-of-service area and out-of-state QF power" (J.S.App. L, p. 3 (emphasis added); PUC Brief, p. 12; PG&E Brief, p. 15).

In the first place, as noted in the

Jurisdictional Statement, the circumstances of the issuance of this modification of the order strongly suggest that this action was a mere legal maneuver having no real purpose other than the frustration of Hydropool's effort to obtain judicial redress for the discrimination being practiced against it. It will be recalled that the modification was issued after the time for action on Hydropool's rehearing request had already expired, after Hydropool had already filed its petition for review in the state Supreme Court, and while the Commission's counsel were engaged in preparing their response to that petition (J.S.Apps. L, Q). It is also worth noting that the modification recites no explanation whatever for the Commission's sudden inclination to reexamine the question, long since answered in the affirmative by its earlier decisions, whether out-of-area QFs should have the same right as other QFs to participate in both the standard offers and the interim solution (J.S.App. L). Given all of these circumstances, it is hard to avoid the conclusion that the belated

modification of the Commission's order should be treated more as a partisan pleading than as a sincere enunciation of administrative policy.

Secondly, even if the modification were not merely pretextual, it would be irrelevant in any event to the present dispute because it is purely prospective in its operation and fails to remedy the previous discrimination to which Hydropool has already been subjected. Even if the Commission now genuinely intends to treat out-of-state QFs the same as out-of-area California QFs in its future decisions, the fact remains that it was not doing so when it abrogated Hydropool's contracts. As noted above, at the very time it excluded Hydropool from participation in Standard Offer No. 4 and the interim solution on the express ground that it was an "out-of-state" QF, the Commission let stand the right to such participation which it had previously granted to the two out-of-area California QFs who had joined with Hydropool in successfully petitioning the Commission to expand the scope of the interim solution to encompass out-of-area QFs (J.S.App. H). The

subsequent modification of the Commission's order has done nothing to alter this discriminatory result or to afford Hydropool the equal treatment that it would have received if the mandate of the Constitution had been observed by the Commission at the relevant time. Thus, whatever its motive, the order on rehearing provides no ultimate excuse for the Commission's otherwise clearly improper action.

F. Other Misstatements

Space does not permit full consideration of the several additional red herrings and misstatements that appear in appellees' briefs.* Appellants must trust that, by this point, the Court will have become sufficiently convinced of the need for skepticism with regard to any of appellees' assertions that these will not readily be accepted without careful examination of their evidentiary support.

---

* These include, among several others, (1) the assertion that Hydropool, unlike the California QFs, is seeking "direct" connection to the Intertie, when in fact Hydropool's output would be delivered to Washington and Oregon utilities and transmitted to the Intertie over their area lines, in precisely the same manner that the output of the (contd.)

III. The "Ripeness" Question

Appellees contend that Hydropool has failed to exhaust its remedies and that the issue presented by this appeal is "not yet ripe for review" because the Commission is presently undertaking an "investigation [that] will decide under what conditions, if any, a Standard Offer type arrangement should be made

---

(contd.) California QFs would reach the Intertie over the area lines of PG&E or, in the case of out-of-area California QFS, over the lines of other neighboring utilities (J.S.App. S, pp. 4-5); (2) the contention that the Commission's order excluding QF power from the Intertie "north of Round Mountain Substation" applies, not only to out-of-state QFs, but also to those California QFs whose generating plants are located north of that point on that Intertie, when in fact the order has no such application because Round Mountain Substation is the northernmost point of connection to the Intertie within California and all of the area lines to which QFs in that part of the state would deliver their power therefore connect to the Intertie either at Round Mountain or at some more southerly point (J.S.App. U, att. 1); and (3) the contention that Hydropool's contracts were not submitted in the manner required by the terms of the standard offer, when in fact (a) those contracts were tendered in perfect conformity with those terms, (b) PG&E's half-hearted contentions to the contrary were consistently disregarded by the Commission, and (c) PG&E itself has conceded that any technical arguments of this sort that it may still wish to raise should be addressed only on remand following the disposition of this appeal on the merits (PG&E Brief, p. 5n.4).

available to QFs in Hydropool's situation" (PUC Brief, p. 21; PG&E Brief, pp. 29-30). In fact, however, the issue presented here and the issues to be addressed in that investigation pass each other like ships in the night. The issue before this Court is whether Hydropool is constitutionally entitled to enforce its executed standard-offer agreements and thereby to sell its power to PG&E at the prices prescribed therein and under the same terms and conditions as have been previously afforded to QFs located in California, including the terms of the interim solution. That issue has been finally decided by the Commission and will not be reconsidered in the current investigation, as the Commission itself made clear when, in the very order that announced that investigation, it reaffirmed its determination that "Hydropool does not have the ability to tender Standard Offer 4 contracts to PG&E under the terms of the interim solution" (PG&E Brief, App. H-18). The only matters to be addressed in the new investigation are, in the Commission's words, the development of different

"pricing and curtailment options" for out-of-state and out-of-area QFs and the determination whether these QFs should be allowed to sell their power to California utilities under "some other pricing arrangement" than that embodied in the previously existing standard offers (PG&E Brief, App. H-16-18). An investigation into these matters obviously holds no prospect of affording the relief presently sought by Hydropool, which consists, not of the creation of "some other pricing arrangement" for its power sales, but rather of the enforcement of the arrangement it has already made with PG&E pursuant to the price terms and regulations of the Commission in force at the time it executed its contracts. It is thus impossible that Hydropool will obtain either a reversal of the Commission's earlier rejection of its claim or any other effective redress of its grievance as a result of the further administrative proceedings. It follows, under a long line of decisions of this Court addressing this precise type of situation, that neither the ripeness doctrine nor the exhaustion requirement

presents any obstacle to the consideration and disposition of this appeal on its merits. Greene v. United States, 376 U.S. 149, 162-63 (1964); McNeese v. Board of Educ., 373 U.S. 668, 674-75 (1963); Hillsborough Township v. Cromwell, 326 U.S. 620, 624-25 (1946); Montana Natl. Bank v. Yellowstone County, 276 U.S. 499, 505 (1928); Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 590-91 (1926).

IV. Summary and Conclusion

Aside from their various mischaracterizations of the record, appellees' arguments appear directed primarily toward establishing the legitimacy of the Commission's concerns about deliveries of power from out-of-area QFs and the potential displacement of economy imports. Their entire effort in this regard is beside the point, however, because appellants readily concede the legitimacy of these concerns. Indeed, appellants further concede that these concerns perhaps might have justified the preclusion of Hydropool's sales to PG&E if they had been applied both even-handedly and prospectively.

The very point of this case, however, which appellees seem to miss, is that these admittedly legitimate concerns were not applied in this way, but were instead enforced in a manner that was both discriminatory and unfairly retroactive. Thus, even while it was denying Hydropool the right to sell to PG&E, the Commission was granting that same right to other QFs who differed from Hydropool only with respect to their in-state location and whose situation was otherwise identical to Hydropool's in every respect, including their need to "wheel" power to PG&E from outside its service area and the adverse impact of their deliveries on economy imports. Similarly, the Commission repeatedly rejected, over a long period of time, the suggestion that either of these concerns would justify a utility's refusal to accept power from any QF, and reversed its position in this regard only after Hydropool had invested substantial sums in reliance on its assurances and almost a year after Hydropool had accomplished the final step that was necessary, under the Commission's own rules, to consummate

a binding contract for the sale of its power to PG&E. As this Court has often pointed out in its decisions under both the Commerce Clause and the Contract Clause, even a concededly legitimate concern of a state government will lose its legitimacy for constitutional purposes when it is applied either in a manner that singles out out-of-state firms for special treatment or in such a way as to upset deliberately induced contractual expectations. E.g, Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 243-44 (1978). That is the situation in this case, and that is the reason why appellants are entitled to relief from this Court.

Dated: December 8, 1986

Respectfully submitted,

JAMES E. HARRINGTON
EDWARD B. LOZOWICKI
THOMAS H. SQUERI
PETTIT & MARTIN
Counsel for Appellants